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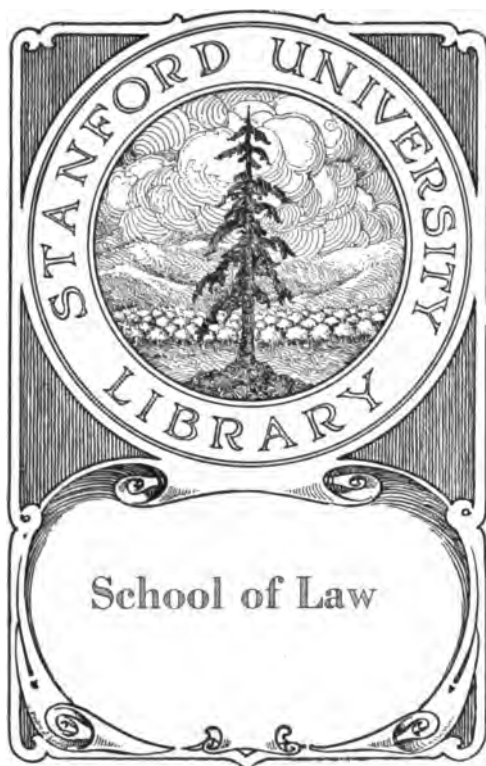
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# Canada Law Journal.

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Nos. 1-2.

## DIARY FOR JANUARY.

1. Fri.....*New Year's Day*. Holiday in H. C. J.
3. Sun.....*2nd Sunday after Christmas*. Lord Eldon died, 1838, æt. 87.
4. Mon.....County Court term begins.
6. Wed.....*Epiphany*. Christmas vacation H. C. J. ends.
8. Fri.....Christmas vacation in Exchequer Court ends.
9. Sat.....County Court term ends.
10. Sun.....*1st Sunday after Epiphany*. L. Ch. Erskine born, 1750. Christmas vac. in Sup. Ct. Can. ends.
12. Tues.....Sittings of Court of Appeal begin. Primary Exam. of students and articled clerks.
14. Thur.....Graduates seeking admission to L. S. to present papers.
16. Sat.....Last day for filing papers with Sec. L. S. before call or admission.
17. Sun.....*2nd Sunday after Epiphany*.
18. Mon.....Sittings Supreme Court of Canada begin.
19. Tues.....First Intermediate Examination. Lord Langdale appointed M. R., 1836.
21. Thur.....Second Intermediate Examination.
22. Fri.....Lord Bacon born, 1561.
24. Sun.....*3rd Sunday after Epiphany*.
26. Tues.....Solicitors' examination.
27. Wed.....Barristers' examination.
30. Sat.....Charles I. beheaded, 1649, æt. 49.
31. Sun.....*4th Sunday after Epiphany*.

## TORONTO, JANUARY, 1886.

WE send to subscribers for the current year our usual Sheet Almanac. It contains some additional information, and will doubtless be as welcome as hitherto. Instead of publishing for this month two numbers as usual, we now issue a double number as more convenient under the circumstances. Whilst wishing our friends—new and old—a Happy New Year, it is pleasant to know that a steadily increasing list shows that our efforts to supply them with good value for their money are appreciated.

## THE COUNTY OF YORK LAW ASSOCIATION.

PURSUANT to a notice previously circulated, a meeting of members of the Bar residing in the county of York was held in the Convocation Room at Osgoode

Hall, on Thursday, December 17th, 1885. Between fifty and sixty members of the Bar put in an appearance. On motion of Mr. D. B. Read, Q.C., Mr. B. B. Osler, Q.C., was requested to take the chair; and on motion of Mr. Moss, Q.C., Mr. Lefroy was requested to act as Secretary of the meeting. Mr. Osler opened the proceedings by briefly stating the object of the meeting, which, he said, was to organize a Bar Association in the county of York, with a view, principally, of securing, in the method provided for by statute, library accommodation in the Court House. He pointed out that if such an association was to be formed, now was the time to do it, and that, when formed, it would be entitled to a considerable grant from the Law Society, and also to the necessary accommodation in the Court House for the purposes of a library, which would be the more necessary inasmuch as, in addition to Courts already sitting in the Court House, the Chancery sittings would also probably be held there when the new Court House was an accomplished fact. He also referred to the success and usefulness of the existing association at Hamilton, and pointed out that all barristers and solicitors were eligible to such an association, and special tickets might also be given to students. The library would be free to all members of the Bar resident outside the county and to all judicial and Court officers.

Mr. Read, Q.C., seconded by Mr. Watt, then moved the first resolution in favour of the establishment of such an association, which was carried unanimously.

The question of the name was then debated, the following were suggested by various gentlemen: "York Law Associa-



## THE COUNTY OF YORK LAW ASSOCIATION—LAND LAW REFORM IN ENGLAND.

tion," "County of York Law Library Association," "Toronto Law Association," and "County of York Law Association." The last name was ultimately carried by a large majority.

The next question moved was the number of the trustees, which was ultimately fixed at nine.

A great number of gentlemen were then nominated as trustees, and on motion of Mr. Worrell the following gentlemen were selected as a committee to consider the nominations and report: C. Robinson, Q. C., C. Moss, Q. C., and N. Kingsmill.

Having retired, the committee returned after a few minutes and reported the following names as a desirable board of trustees: B. B. Osler, Q. C., J. K. Kerr, Q. C., W. Lount, Q. C., C. H. Ritchie, Q. C., T. J. Robertson (Newmarket), G. F. Shepley, E. D. Armour, G. T. Blackstock, W. Barwick, and the report of the committee having been voted on was accepted by the meeting, and the above gentlemen chosen to be the first trustees of the association.

After some discussion the membership fees were settled at \$5 per share and an annual fee of \$2 a year, and the proceedings concluded by a great number of gentlemen signing for shares in the association. It may be added that at the conclusion Mr. G. T. Blackstock proposed a committee of gentlemen to organize a dinner during the Christmas vacation, in honour, we presume, of the infant association. The idea proved acceptable to the meeting, and a committee, consisting of H. Cameron, Q. C., B. B. Osler, Q. C., C. Moss, Q. C., W. Lount, Q. C., G. T. Blackstock, H. Murray, W. Barwick, G. F. Shepley, J. A. Worrell, and A. M. Grier, was accordingly formed; but we believe these gentlemen have resolved, as it appears to us very wisely, to postpone the dinner until term time.

## LAND LAW REFORM IN ENGLAND.

At the recent meeting of the English Incorporated Law Society, at Liverpool, the subject of land law reform formed a prominent topic of discussion, both in the President's address and also in the papers of Messrs. J. Hunter and T. G. Lee, which were read before the Society.

The abolition of the law of primogeniture was advocated by Mr. Lee, and also the principle that the real estate of a deceased person should, notwithstanding any testamentary disposition, devolve in the first instance upon his legal personal representative and be subject to the payment of his debts.

That the law of primogeniture should have been maintained so long in force in England, in spite of its manifest injustice, is certainly wonderful. Some of our readers may be familiar with a popular comedy in which the absurdity and injustice of that law are cleverly satirized by one of the characters who mournfully soliloquizes on the inconvenience of having been born seven minutes after his brother, inasmuch as that seven minutes' start had given his brother a coronet and £80,000 a year, and left him a commoner with £300 a year!

The prejudice of the aristocratic portion of the community in favour of the maintenance of this state of things is strong, however, and it is an antiquated notion that will die hard in England.

In this country, where we have no aristocracy, we had no great difficulty in amending the law, thirty years ago, so as to give all the children of an intestate equal rights in his estate.

We have not, however, in this Province yet adopted the other amendment which Mr. Lee advocates, viz., the devolution of the real estate of a deceased person on his personal representative. This, how-

## LAND LAW REFORM IN ENGLAND.

ever, is a reform that is sure to be effected here at no distant day, and without the present generation wasting a lifetime thinking about it. In fact it nearly became law at the last session of the Legislature; the principle met with universal approval, and it was not due to any opposition that the Bill failed to pass the third reading. That it was dropped, was more probably due to doubts being raised as to whether the Bill as framed would satisfactorily accomplish the end in view, rather than to any doubts as to the advisability of the principle of the measure.

The question of registration of titles was another matter discussed, but it does not seem to meet with much favour with our English brethren. Although manifestly alive to the disadvantages of a system of conveyancing which necessitates the tracing title through successive owners for a long period of years on the occasion of every transfer or dealing with a piece of land, yet they do not apparently seem to think it is any great object to the public to get rid of that objection to the present system. The kind of argument against registration of title which appears to satisfy English solicitors may be gathered from the following extract from Mr. Lee's paper:—"The necessary publicity of registration of title is also a very strong argument against its adoption. The advocates of registration of title always appear to me to be placed in this dilemma: If the vendor's title is really simple, registration confers no advantage either on him or the purchaser; if the vendor's title is in fact complicated, registration cannot make it simple." With regard to the publicity of a public registry, the same arguments used to be urged in this Province. It was assumed that there was a large class of busy-bodies who had nothing else to do but to go round to the Registry Office, to find out all about their neighbours' private affairs, and for a long

time, in deference to this absurd supposition, the system of registration by memorial prevailed in this Province. In 1864, however, a change was made requiring a duplicate of every deed to be registered in full, and the result of twenty years' experience has been eminently satisfactory in every respect, and we doubt if any one could be found in this Province who would be willing to return to the former plan of registration by memorial.

The dilemma which Mr. Lee proposes we are inclined to think is no dilemma at all. Registration of title according to the Torrens plan gets rid of "the chain of title" altogether. The enquiry, Who has owned the property in question from time to time during the last forty years or so? becomes a matter of mere antiquarian interest. For the practical business of life the question, Who is the present owner, and to what charges or qualifications, if any, is his title subject? is the only question to be considered. And a registered title supplies the answer to this question, not by reference to a long string of deeds, but to one instrument only, in which all the information necessary to be known is contained. Now, whether a person has a simple or a complicated title, this advantage accrues by registration. No matter how simple a title may be under the present system of conveyancing it depends on, a chain of deeds, and it can hardly be said that it is not simplified when, in place of several title deeds one is substituted, and certainly Mr. Lee is hardly justified in saying that a complicated title is not by registration made simple. On the contrary, a simple title is made still simpler, and is prevented from getting complicated; and a complicated title is not only made simple, but is also prevented from again becoming entangled. There is, besides, the further benefit to persons dealing in land under the Torrens system of registration afforded by the guarantee of

## LAND LAW REFORM IN ENGLAND—OUR ENGLISH LETTER.

the Government of the correctness of the register, which is practically an insurance of the title of the very best description.

Mr. Hunter graphically describes the disadvantage of the present system of conveyancing, and asks: "What would stock-brokers say if before they could sell £1,000 stock or consols, they had to show to whom the stock had belonged for the last forty years—to show that all duties which had accrued to the crown during that period had been paid? That every person to whom the stock had descended by death during that period was legitimate? That no former owner had acquired the stock by voluntary gift; and, if the actual sellers were trustees, if the purchase money could only be paid to them in person, or to their bankers. Would ten per cent. be considered a sufficient remuneration for this? Would not the necessity for such proofs put a stop to ninety-nine per cent. of the business of the Stock Exchange? Why should owners of land continue to be liable to these disabilities which owners of no other class of property are under?"

But though Mr. Hunter discourses so eloquently on the evils of the system of land transfer at present prevailing in England, we look in vain through the catalogue of remedies which he proposes for one that will effectually get rid of that greatest defect of all, viz., the necessity of investigating the "chain of title." The "chain of title" is the principal source of all the trouble and difficulties attending land transfer under the English system, and it is only by some system of registration of title, similar to that devised by the late Sir R. Torrens, that that defect can be effectually remedied.

## OUR ENGLISH LETTER.

LEGAL machinery was very long in reaching what may be called thorough working order after the long vacation. First came the circuits, which were confined for the most part to the clearing of the gaols, and then the general election, which kept a great number of leading men away from the Courts. These two facts must form my apology for postponing this letter, which, indeed, comes to this that, except the Stead trial, which was unsavoury, there was nothing at all to write about. This is said on the supposition that Canadian circles would not be keenly interested in the discussion of obscure points in our new franchise law. The sum total of the decisions may be said to consist in the fact that the legislature was, by no means for the first time, frustrated in its intentions by reason of bad drafting. It enfranchised some classes by accident and equally involuntarily left others without votes. Perhaps the most comic case was that of the undergraduates of Oxford and Cambridge. Their enfranchisement was described as *un fait accompli*, but, lo and behold, when the terms of their tenure were examined, it was found that the work had been insufficiently performed.

This is an era of new men. We have in Lord Halsbury a Lord Chancellor who attends far more closely than his predecessor to judicial work, who is by no means averse to the giving of silk gowns, and whose one failing is an obvious tendency to nepotism. The result is that there is an opportunity of studying the rise of new men in leading business, and it cannot be denied that some of them are showing great promise. Foremost among them are Mr. Ffrench, Q.C., of the Northern Circuit, whose opinions upon points of election law are quoted with almost the same respect as that which is paid to the

## OUR ENGLISH LETTER.

decision of a judge, and Mr. Cramp, Q.C., whose successes have, judging from the papers, been almost phenomenal. Totally unlike Lord Halsbury in manner, he has the same versatility. When the registration appeals were being heard his name was a standing dish. He has been known to appear in Equity cases, he appears in the Divorce Court—in fact he seems to be equally at home everywhere. Now, it is not often that a man called within the Bar achieves success with such rapidity as has been described, and for this reason one may have to look for some external causes. In the first place, it is obvious that there must have been an opening of tolerable width. How came it? Partly, no doubt, from the invincible repugnance of the late Lord Chancellor towards the creation of "silks," which prevented the inner Bar from being recruited at the ordinary rate. Then, the present Lord Chancellor's promotion to office sent much work loose about the Temple. Lately, again, Mr. Justice Wills has been raised from a large practice to the Bench, and last, but by no means least, Mr. Charles Russell, Q.C., has broken down temporarily. When one of the most hard-worked men at the Bar gives up his long vacation to a criminal case, and follows this weary work with a violent electioneering campaign, he must expect to pay the penalty by wintering in the South of France.

There have been changes also upon the Bench. Lord Justice Baggallay, who had long been ailing, retired from the Court of Appeal last week, and his place was taken by Sir Henry Lopes. The appointment is neither popular nor unpopular. As a lawyer Sir Henry Lopes was not qualified for promotion, and he was not chosen for his legal capacities. On the other hand the Queen's Bench Division is not strong in genuinely learned judges. Failing, therefore, an appointment direct from the Bar,

the choice might just as well fall upon Sir Henry Lopes as any one else. Moreover, his political claims were strong, and he is one of the pleasantest of the Judges in manner. The experience of late years has shown, however, that appointments directly from the Bar are successful. Thesiger and Holker, L.JJ., left great reputations behind them, though their careers were short, and Bowen, L.J., is an extraordinarily good Judge of Appeal. All three were promoted directly from the Bar. Meanwhile Sir Henry Lopes leaves a vacancy for a new judge and speculation is rife. Rumour first fixed the honour upon Sir John Eldon Gorst, Q.C., who is a lawyer of the purely political type. Your correspondent has known the Courts for more years than he cares to reckon, yet never saw he Sir J. E. Gorst, Q.C., appear in any case until he became Solicitor-General, nor does he ever remember a law officer with less work than Sir J. E. Gorst, Q.C. His place is in Parliament, and not upon the Bench and, according to the latest rumours, he himself is aware of the fact, and has refused the proffered honour. If so the choicelies between Mr. Grantham, Q.C., and Mr. Edward Clark, Q.C. Now the latter has been shelved once, which bodes ill for his chances; the former, on the other hand, has deserved exceedingly well of his party, and has a perfectly safe seat at Wandsworth, a consideration which is likely to have considerable weight, especially having regard to the fact that since Mr. Clark was elected at Plymouth the *Times* has published a damning exposure of the proceedings of the Conservative Association of that town. From what has been written your readers will see that men and their ambitions are the leading topics of the day in legal circles. In another fortnight, however, we shall settle down into the old and steady grooves.

TEMPLE, December 7.

## THE MARRIED WOMAN'S PROPERTY ACT OF 1884.

**THE MARRIED WOMAN'S PROPERTY ACT OF 1884.**

THIS Act was passed, no doubt, with the intention of extending still further than has been done by previous Acts the power of married women to bind by contract, and otherwise to deal with their property and earnings; but how far the process of emancipation has gone can hardly yet be determined. Some light, however, can be drawn from an Act, much similar in its character and containing many clauses in identical words, passed by the Imperial Legislature, entitled "Married Woman's Property Act of 1882."

It may be necessary for a moment to state just how far previous Acts relating to married women have enabled such married women to hold, bind by contracts, and part with and enjoy their property, even, it may be, against the will of their husbands.

By common law, the entire personal property of a woman on marriage became her husband's absolutely, and her choses in action, when reduced into possession by the husband, were also his absolutely; and he could at will, by instituting an action at law or suit in equity, reduce her choses in action into possession, on obtaining a judgment at law or decree in equity. As regards her real estate, he became entitled on marriage to a freehold estate during their joint lives, and after the birth of living issue capable of inheriting it, he also became entitled on the death of his wife as tenant by curtesy to a freehold estate during his life.

The hardships that might result to a married woman possessing property at the time of her marriage, or becoming so entitled to the same during coverture, were largely obviated by marriage settlements and by the interposition of trustees, and where by such means her property was held with power of anticipation, it was hers as absolutely as if she were of full age

and unmarried, nor was it absolutely necessary, even before 35 Vict. cap. 16, that trustees should be appointed if the clear intention of both husband and wife was that a particular portion of the wife's property should be held and enjoyed by her as her separate estate. See *Slanning v. Style*, 2 P. Will. 337, and *Mangey v. Hungerford*, 2 Equity Ca. Abr. 156, in margin; see also the judgment of Spragge, Chancellor, in *Adams v. Loomis*, 24 Grant, 242. In the latter case the learned Judge held that, as the husband and wife had divided the farm of the husband, the wife receiving half thereof, in settlement of her claim to alimony, and as both intended that she should hold her portion free from her husband's control, as her own property, she had full power of alienation quite irrespective of "The Married Woman's Act of 1872." In the absence of the appointment of any trustees to protect the wife's separate property, from the effect of the common law rights of the husband, and where it was intended that such property should be her separate estate, the husband in equity became, so far as it was necessary, a trustee for the purposes of preserving his wife's separate estate from its common law incidents.

By 22 Vict. cap. 34 (Con. Stat. U. C. cap. 73), the right was given to a married woman under the circumstances referred to in that Act, to use and enjoy all such real and personal property as was not, on the 4th day of May, 1859, reduced into the possession of her husband, and in case the marriage took place after that date, she had like rights in respect of all her real and personal property free from the control or disposition of her husband, without her consent, and in as full and ample a manner as if she had continued sole and unmarried. This, however, did not give her an absolute title to her real estate, but merely a right of enjoyment. Such real estate could not be bound by her

## THE MARRIED WOMAN'S PROPERTY ACT OF 1884.

contracts, nor could it be conveyed by her except with the concurrence, and by the assistance of her husband. With respect to her personal property acquired after the passing of that Act, or not then reduced into the possession of her husband, notwithstanding it was a long time questioned whether she had the right to bind it by her contracts, or in other words, whether it was her separate property, possessing all the incidents of separate property, including the power of alienation, it was finally held in the Court of Appeal in *Lawson v. Laidlaw*, 3 App. R. 77, Patterson, J.A., delivering the judgment of the Court, that such personal property was her separate estate, and would be bound by her contracts.

A great advance was made, however, in the emancipation of married women so far as their real estate was concerned, by 35 Vict. cap. 16, generally known as the Married Woman's Act of 1872, and afterwards consolidated in Revised Statutes of Ontario cap. 125. It may be pointed out, however, that the Revised Statute is not a precise consolidation of 32 Vict. cap. 16, as the effect of section 1 of this Act was changed by Sched. A. (156) 40 Vict. cap. 7, by which latter Act the Act of 1872 is confined to the case of marriages taking place after the 2nd March, 1872, while by 35 Vict. cap. 16, section 1, the Act would seem to have embraced the case of a woman married before the passing of the Act, but acquiring real estate after that date. The judgment of Vice-Chancellor Blake, in *Adams v. Loomis*, 22 Grant, 99, proceeds upon the ground that the Act of 1872 enabled a married woman, no matter when married, to deal with, bind by contract and convey real estate acquired after the 2nd March, 1872. See also the remarks of the late Chief Justice Spragge, then Chancellor, upon the same subject, in the case of *Griffin v. Pattison et ux.*, 45 U. C. Q. B., 536. The

effect of this latter Act, confining it entirely to cases arising under Revised Statutes of Ontario cap. 125, is that women married after the 2nd day of March, 1872, have complete control over, and full power to bind by their contracts, as well as to convey, their real estate, nor are their husbands necessary parties to such conveyances notwithstanding the very general language of Revised Statutes of Ontario cap. 127. See *Boustead v. Whitmore*, 22 Grant, 222, and *Bryson et al v. Ontario and Quebec Railway Co.* 8 O. R., 380; though as to the effect of this Act upon the husband's right as tenant by curtesy, see *Furness v. Mitchell*, 3 App. R. 510.

However, as to the contracts of married women under the Act of 1872, such contracts only bound such separate estate as she possessed at the time of her making such contract, and which was still in esse at the time the contract was sought to be enforced. See *Lawson v. Laidlaw*, 3 App. R. 77, and *Pike v. Fitzgibbon*, 17 Chy. Div. 454, nor would an injunction be granted to restrain a married woman from parting or dealing with her separate estate, while her contract was still in esse, and no judgment had been entered in the suit to enforce such contract.

It is difficult as yet to determine how far a married woman's liability and her capacity to contract and to sue and to be sued, have been increased by the Married Woman's Property Act of 1884, which, as has been before stated, is in many respects similar to the Married Woman's Act of 1882, of the Imperial Legislature. Some decisions, however, have been given both here and in England, which to a certain extent will be of assistance, in enabling us to arrive at a proper construction of the Act in question.

It has been decided in the case of *Re Shakespeare, Deakin v. Lakin*, 30 Chan. Div. 169, that if a married woman having no separate estate enters into a con-



## THE MARRIED WOMAN'S PROPERTY ACT OF 1884.

tract she will not be liable, although at the time the contract was sought to be enforced she had separate estate from which the damages arising from a breach of such contract could be secured. This decision would seem to be correct for two reasons—1. This Act is enacted for the benefit only of married women having separate estate, and to give such married women more extended powers of dealing with such estates, and, seemingly, the Act is not intended to affect in any way a married woman having no separate estate. 2. By the very language of sub-section 4, section 2, only such contracts of married women are affected as are entered into with respect to, and to bind, the separate estate of such married women, and the contract seems to bind not only such separate estate as such married woman then possesses, but subsequently acquired separate estate. If she has, when attempting to enter into the contract, no separate estate, then the Act does not reach her case, and her disability is not in any way affected or removed by the Act.

A pertinent question may, however, be here raised, and that is: What would be the effect, if a married woman having a small amount of separate estate makes a contract which involves her in a liability for a very much larger amount than the separate estate she had at the time of her entering into such contract, and to what extent would her future separate estate be liable? Suppose for example, she endorses her husband's note, say for \$1,000, having separate estate to the value of \$100, and afterwards acquires, or becomes possessed of, abundant separate property, amply sufficient to satisfy such liability. Will she be liable, only to the amount of the value of the separate estate she had when she entered into such contract; or, will she be liable to the fullest extent of her subsequently acquired separate estate? It would almost seem by strict reasoning that as she is not liable at all in case

she has no separate estate, she should not be made liable, as against her after acquired separate estate, to a greater amount than the separate estate she possessed at the time she made the contract. It seems to be a true principle with reference to such contracts, that if a married woman makes a contract, having separate estate, it is assumed that she intended that some effect should be given to such contract, namely, that it should be paid so far as she has means to pay it; but it can hardly be said that if a married woman makes a contract incurring liability far beyond the amount of her separate estate, she can intend to bind her separate estate further than the means she then had would enable her so to do, and as to the remainder of such liability, it would almost seem that no such intention could be implied. There has as yet been no decision upon this point, but no doubt such a case will soon arise. Baggallay, L.J., intimates that the form of judgment in the case of *Turnbull v. Forman*, 15 Q. B. D. 234, may not be a proper form, and the difficulty referred to seems to have entered his Lordship's mind. A perusal, however, of the form of that judgment would lead to the inference that the judgment is intended to be limited in its operation in the manner above pointed out, and that it leaves the principle to be applied by the officer of the Court who takes the necessary accounts under the judgment.

It may be here pointed out that the form of judgment in the case of *Quebec Bank v. Radford*, 10 P. R. 619 and *Cameron v. Rutherford et al.* 10 P. R. 620, is wrong in the case of a contract made before the passing of this Act, and also may be wrong as to the quantum of separate estate that may be affected by a judgment under this Act against married women. It is clear from the decision in the case of *Turnbull v. Forman*, 15 L. R. Q. B. D., overruling *Bursell v. Tanner*, 13 L. R. Q.

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B. Div., and affirming *Coulson v. Ingram*, 27 Chy. Div. 632, that this Act is not retrospective, and in no way affects the contracts of married women made before the Act was passed.

It has been decided that a married woman under this Act may bring an action for the recovery of damages in respect to torts suffered by her before the Act came in force. See *Weldon v. Winslow*, 13 Q. B. Div. 784. In the case of *Weldon v. Debathe*, 14 Q.B. Div. 339, it was decided that a woman married since the Married Woman's Act of 1870 of the Imperial Legislature (which is similar to our Married Woman's Act of 1872), and acquiring by her own earnings a dwelling-house, can bring an action for trespass against any one entering her dwelling under her husband's authority and for a purpose unconnected with her husband's desire to cohabit with her. This decision leaves yet undecided whether a married woman can expel her husband from her dwelling (held by her as separate estate) in case she wishes no longer to cohabit with him. It would seem that if her reason for wishing to expel him were a valid and proper reason, she would have such power; and it would further almost appear (for in the case last cited the question merely was suggested but not decided) that under any circumstances she has such power if she so wishes to prevent her husband from entering her dwelling even for the purpose of cohabitation. In other words, if she expelled him from her dwelling, an action of trespass on his part would not lie against her. This point is incidentally discussed in the case of *McGuire v. McGuire*, 23 C. P. 123, where it was held that a married woman could not bring an action of trover against her husband for refusing to deliver to her her furniture, she having left her husband without just cause. The judgment of the Court in that case, given by Mr. Justice Gwynne, has been

somewhat shaken by the case of *Lawson v. Laidlaw*, so far as the reasoning of the learned Judge is concerned, and it certainly seems strange that a married woman's separate estate should not possess the usual qualities of separate estate when in the joint possession of her husband and herself for marital purposes, when the Act declares that such property is her separate property, and free from the control of her husband. It is not unlikely that if this question be again fairly raised either as regards the furniture of a married woman, or as regards her real estate, the same being her separate estate, it will be decided that she has, under the Act of 1884 at any rate, absolute control over such property, even to the extent necessary to deprive her husband of the enjoyment thereof jointly with herself. It is difficult to see how that which the Act says is the separate property of a married woman, and free from the control of her husband, can have any other quality than that which is ordinarily possessed by the separate property of a married woman. She can certainly sell such property with, or without, her husband's consent, and she can bind it by her contracts, both of which would deprive her husband of the enjoyment of it. The necessary consequence would seem to be that her control over such property is so absolute as to enable her to deprive her husband of the enjoyment thereof under any circumstances when she sees fit so to determine.

Another point necessarily arising in the construction of this Act will be as to the power of a married woman to convey her separate estate. *Boynton v. Collins*, 27 Chy. Div. 604, decides that the real estate held by a married woman before the Married Woman's Property Act of 1882 in reversion or remainder, and which has fallen into possession since the passing of that Act, is within section 5 of the Act, and may be transferred by her without the con-

## THE MARRIED WOMAN'S PROPERTY ACT OF 1884.

currence of her husband. The same point also seems to have been raised in *Thomson v. Curson*, 29 Chy. Div. 177, Kay, J., doubting. It would not be safe, however, to rely upon this judgment as being a final determination of the point, as the effect certainly is to deprive the husband of a vested right, and another and very simple construction of section 5 would leave the husband's right unimpaired. The case of *Fowke v. Draycott*, 29 Chy. Div. 996, deciding that an order in the usual form, obtained under section 91 of the Fines and Recovery Act of 1883 by a married woman, and empowering her to dispose of her real estate without the concurrence of her husband, does not deprive him of his common law rights which he acquired in the property by reason of coverture, is an important decision in view of the effect of section 22 of our Act upon Revised Statutes of Ontario, cap. 127. Where under such an order a married woman sold and conveyed her estate and interest in the real estate in which her husband had an interest, her husband refusing to join, it was held that the husband's common law rights arising by coverture remained unaffected by the wife's alienation.

This case may perhaps throw some light upon the recent decision of Ferguson, J., in *Re Coulter et al. & Smith*, 8 O. R. 536, from which it would almost seem that the learned Judge has decided that a married woman, no matter when married, can convey real estate acquired by her at any time, and in which her husband may have a vested interest, without the concurrence of her husband; but the judgment is silent as to the effect of such conveyance upon the husband's estate (if any). In that case, the marriage took place before, and the land in question was acquired after, 1872. It may be that his lordship simply determined that married women in all cases have power to convey their estate

in lands owned by them, leaving unaffected the estate (if any) of the husband. This would appear to be the correct view of the Act; for, by the repeal of sections 4 to 12 and from the middle of the tenth line to the close of section 3, of cap. 127 R. S. O., it appears clear that a married woman may convey all and every interest she may have in her real estate without her husband's joining; but this might be done, and yet leave unaffected any estate of her husband therein; as by section 22 of the Act, any right previously acquired by the husband in his wife's estate is left unaffected and still exists, and in such a case, if the husband still has an estate in the lands in question, it would require a conveyance from the husband as well as from the wife to vest in a purchaser the entire estate of the husband and wife in the lands sought to be conveyed. It can hardly be that the learned Judge came to the conclusion that, inasmuch as the sections of cap. 127, Revised Statutes of Ontario above mentioned were repealed by this Act, she may now convey her lands to a purchaser in which her husband may have a vested right, so as to cut out such vested right, even against the will of her husband. It is somewhat unfortunate that the judgment is so short; but as the question to be decided in that case was whether the married woman could convey *her interest* in the lands in question, though the husband if living, had undoubtedly a vested interest therein, the judgment would seem to be quite correct in holding that she could convey under the Act in question her interest in such lands, leaving the purchaser still to deal with her husband, should he ever return; for in that case he had abandoned his wife, and had not been heard of for ten years.

The Courts are certainly very unwilling to interfere with vested rights, and sometimes are inclined to give an entirely

## THE MARRIED WOMAN'S PROPERTY ACT OF 1884—NOTES OF CANADIAN CASES. [Sup. Ct.]

secondary meaning to the language of a Statute seemingly clear enough when read by an ordinary layman, and which, when so read, does interfere with vested rights. See *Hill v. East and West India Stock Co*, 9 App. Cases 448, where the language of the Statute referred to in that case was so far tortured by the majority of the Law lords to prevent injustice as to lead Lord Bramwell to use somewhat characteristic language when interpreting the same Statute. In this view attention may also be directed to the case of *Re Docwra*, *Docwra v. Faith*, 29 Chy. Div. 693, and *Re Adams Trusts*, 33 W.R. 834.

Many points, no doubt, will yet be raised before the Act has received full investigation. It does seem, however, that it would have been much preferable had our Legislature in 1872 simply enacted that married women should thereafter be treated as having been relieved of every disability arising from coverture, and not have followed the language of the English Statutes where the process of emancipation of married women apparently has been much slower than that called for by the public. No doubt the Imperial Legislature, as well as our own, will soon entirely relieve married women of every disability, and enable them to contract as fully in all respects as if they were unmarried.

## NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

## SUPREME COURT OF CANADA.

Nova Scotia.]

EUREKA WOOLLEN MILLS COMPANY V. MOSS  
ET AL.

*Appeal—New trial ordered by Court below—Verdict against weight of evidence.*

The Supreme Court of Canada will not hear an appeal where the Court below, in the exercise of its discretion, has ordered a new trial on the ground that the verdict is against the weight of evidence.

*McIntyre*, for the appellants.

*Dunlop*, for the respondents.

Nova Scotia.]

HOWARD V. LANCASHIRE INSURANCE CO.

*Appeal—New trial ordered by Court below—Questions of law—Insurance policy—Insurable Interest—Special condition—Renewal—New contract.*

J., manager of the appellant's firm, insured the stock of one S., a debtor to the firm, in the name and for the benefit of the appellant. At the time of effecting such insurance, J. represented the appellant to be the mortgagee of the stock of S.

S. became insolvent and J. was appointed creditor's assignee, and the property of the insolvent was conveyed to him by the official assignee. On March 8th, 1876, S. made a bill of sale of his stock to J., having previously effected a composition with his creditors under the Insolvent Act of 1875, but not having had the same confirmed by the Court.

The insurance policy was renewed on August 5th, 1876, one year after its issue. On January 12th, 1877, the bill of sale to J. was discharged, and a new bill of sale given by S. to the appellant, who claimed that the former had been taken by J. as his agent, and the execution of

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the latter was merely carrying out the original intention of the parties. The stock was destroyed by fire on March 8th, 1877, and an action having been brought on the policy, it was tried before a judge without a jury, and a verdict was given for the plaintiff.

The Supreme Court of Nova Scotia set aside this verdict, and ordered a new trial, on the ground that the plaintiff had no insurable interest in the property when the insurance was effected, and that no subsequently acquired interest would entitle him to maintain the action. One of the conditions of the policy was "that all insurances," whether original or renewed, shall be considered as made under the original representation, in so far as it may not be varied by a new representation in writing, which, in all cases, it shall be incumbent on the party insured to make, when the risk has been changed, either within itself, or by the surrounding or adjacent buildings. On appeal to the Supreme Court of Canada,

*Held*, that the case did not come within the rule laid down in *Bureka Woollen Mills Co. v. Moss* (decided this term), and was one properly appealable.

That the appellant having had no insurable interest when the insurance was effected, the subsequently acquired interest gave him no claim to the benefit of the policy, the renewal of the existing policy being merely a continuance of the original contract.

Appeal dismissed with costs.

*Gormully*, for the appellant.

*Tremaine*, for the respondents.

New Brunswick.]

BYRNE V. ARNOLD ET AL.

*Justices of the peace — Conviction — Canada Temperance Act, 1878, Sec. 105 — Absence — Wrongful arrest — Justification.*

A. and B., Justices of the Peace for King's County, were sued for issuing a warrant of commitment under which B. (appellant) was imprisoned.

The facts, as proved at the trial, were as follows: A prosecution under the Canada Temperance Act, 1878, was commenced by two justices, A. and B., and a summons issued. On the return of the summons, on the applica-

tion of the defendant, A. and B. were served with a subpoena, to give evidence for the defendant on the hearing; whereupon two other justices (the respondents), at the request of A. and B. under the provisions of sec. 105 of the Act, heard the case and convicted the appellant. A. and B., though present in the court room as witnesses, took no part in the proceedings.

The Supreme Court of New Brunswick ordered a nonsuit to be entered. On appeal to the Supreme Court of Canada,

*Held* (affirming the judgment of the Court below, HENRY and TASCHEREAU, JJ., dissenting), that as the conviction was good on its face, it was a justification for respondents until set aside, for anything done under it.

*Held*, also, that upon the facts disclosed A. and B. were "absent," within the meaning of sec. 105 of the Canada Temperance Act, 1878.

Appeal dismissed with costs.

*Weldon*, Q.C., for appellant.

A. S. White, for respondents.

New Brunswick.]

FAWCETT V. ANDERSON.

*Contract — Novation — Sale of land — Delivery of deed for inspection — Receipt for — Action on.*

Land was sold at auction by A. (plaintiff), under power of sale in a mortgage to W., and one F. (defendant), became the purchaser; the terms of sale being ten per cent. cash, and balance in one and two years, with interest, secured by joint notes of defendant and some other responsible person. Defendant paid the ten per cent. and a conveyance was prepared and executed by W. in favour of defendant, and was given to plaintiff for the purpose of having sale completed. Plaintiff took the deed to defendant, who said that he wished to show it to his attorney; but plaintiff objecting to part with the deed without something to show that the purchase money had not been paid, defendant signed and gave to plaintiff a receipt as follows: "Received from E. A. (plaintiff) a deed given by W. for a piece of land bought, etc. The above mentioned deed I receive only to be examined, and if lawfully and properly executed, to be kept; if not lawfully and properly executed, to be returned to E. A. When

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the deed is lawfully and properly executed to the satisfaction of my attorney, I will pay the amount of balance due on said deed, provided I am given a good warrantee deed, and the mortgage which is on record is properly cancelled if required." In an action brought by plaintiff on this agreement, a verdict was given to the plaintiff for \$572 and interest; but the jury found in answer to a question left to them, that the writing signed by the defendant on the 2nd October was not a new agreement for the payment of the purchase money of the land.

This verdict was subsequently set aside by the Supreme Court of New Brunswick, and a new trial ordered. The case having come on for trial again in January, 1884, a verdict was found for the defendant, the present appellant. The plaintiff, the present respondent, afterwards moved to set aside the verdict and for a new trial, or for a verdict to be entered for him, under leave reserved, for nominal damages, (the purchase money having been paid to W., after this suit was brought,) which a majority of the Court ordered, and against which order an appeal was taken to the Supreme Court of Canada, and it was

*Held* (reversing the judgment of the Court below, STRONG, J., dissenting), that there was no new contract created between appellant and respondent, and the action against appellant was not maintainable.

Appeal allowed with costs.

*Hannington, Q.C.*, for appellant.

*Blair, Q.C.*, for respondent.

New Brunswick.]

#### TOWN OF PORTLAND V. GRIFFITHS.

*Defective sidewalks—Damages—Corporation, Liability of—Contributory negligence.*

Declaration by first count alleged that defendants had the care of the public streets of the town of Portland. That it was their duty to keep them in a safe and proper condition, for citizens passing to and fro; that there was a street in such town under such care and subject to such duty, known as Main Street; that plaintiff was walking and passing over said street, and by reason of negligence and improper conduct of defendants, in not keeping the same in repair, etc., was injured.

Second count set out that plaintiff travelling upon said street, and using due care, was injured.

Third count that defendants negligently allowed a hole to remain on said street, and that plaintiff while lawfully using the street, and without negligence on her part, was hurt.

The evidence of the plaintiff showed that the accident whereby she was injured happened while she was engaged in washing the window of her dwelling from the outside of the house, and, that in taking a step backward, her foot went into a hole in the sidewalk, and she was thrown down and hurt. She also swore that she knew the hole was there.

The jury awarded her \$300 damages, and the Supreme Court of New Brunswick refused to set aside the verdict.

*Held* (HENRY, J., dissenting), that the plaintiff was neither walking and passing over, travelling upon, or lawfully using the said street, as alleged in the declaration, and that the verdict must be set aside.

*Held*, also, that the accident, if occasioned by the defective sidewalk, was due to plaintiff's own negligence.

Appeal allowed with costs.

*A. A. Stockton*, for appellant.

*Skinner, Q.C.*, for respondent.

New Brunswick.]

#### CHAPMAN V. RAND.

*Canada Temperance Act—Scrutiny—Powers of County Judge.*

A judge of the County Court, on holding a scrutiny of votes under the provisions of the Canada Temperance Act, can only determine which side has a majority of the votes polled, by inspection of the ballots, and has no power to enquire into corrupt acts, such as bribery, etc., which might avoid the election. (HENRY, J., dubitante.)

Appeal allowed with costs.

*Blair, Q.C.*, for appellant.

*R. B. Smith*, for respondent.

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New Brunswick.]

TAYLOR V. MORAN.

*Marine insurance—Voyage policy—Sailing directions—Time of entering Gulf of St. Lawrence—Attempt to enter—Amendment of pleadings.*

In an action on a voyage policy containing this clause, "warranted not to enter, or attempt to enter, or to use the Gulf of St. Lawrence, prior to the tenth day of May, nor after the thirteenth day of October (a line drawn from Cape North to Cape Ray, and across the Strait of Canso, to the northern entrance thereof, shall be considered the bounds of the Gulf of St. Lawrence seaward)," the evidence was as follows: The Captain says: "The voyage was from Liverpool to Quebec, and ship sailed on April 2nd. Nothing happened until we met with ice to the southward of Newfoundland, shortened sail and dodged about for a few days trying to work our way around it. One night ship was hove-to under lower main-top-sail, and about midnight she drifted into a large field of ice. There was a heavy sea on at the time, and the ship sustained damage. We were in this ice three or four hours—laid-to all the next day—could not get any further along on account of the ice. In about twenty-four hours we started to work up towards Quebec." The log-book showed that the ship got into this ice on the 7th May, and an expert, examined at the trial, swore that from the entries in the log-book of the 6th, 7th, 8th and 9th of May, the captain was attempting to enter the Gulf of St. Lawrence. A verdict was taken for the plaintiff by consent, with leave for the defendants to move to enter a nonsuit or for a new trial, the Court below to have the power to mould the verdict, and also to draw inferences of fact the same as a jury.

*Held* (reversing the judgment of Supreme Court of New Brunswick, HENRY, J., dissenting), that the above clause was applicable to a voyage policy, and that there was evidence to go to the jury that the captain was attempting to enter the Gulf contrary to such clause.

Appeal allowed with costs.

Weldon, Q.C., for appellant.

Stockton, for respondent.

Quebec.]

THE QUEEN V. DUNN.

*Petition of right—Provincial debt, Liability of Dominion for—Order in Council—Account stated—Consideration—Right to petition.*

Prior to Confederation, one T. was cutting timber under license from the old Province of Canada, on territory in dispute between that Province and the Province of New Brunswick. In order to utilize the timber so cut he had to send it down the St. John River, and it was seized by the authorities of New Brunswick and only released upon payment of fines. This continued for two or three years until T. was obliged to abandon the business.

As a result of negotiations between the two Provinces, the boundary line was finally fixed, and a commission was appointed to determine the state of accounts between them in respect to the disputed territory. One member of the commission only reported New Brunswick to be indebted to Canada in the sum of \$20,000 and upwards, and in 1871 these figures were verified by the Dominion auditor.

Both before and after Confederation T. frequently urged the Government of Canada to collect this amount, and indemnify the licensees who had suffered owing to the said dispute; and finally, by an order in council of the Dominion Government (to whom it was claimed the debt was transferred by the B. N. A. Act) it was declared that a certain amount was due to T., which would be paid on his obtaining the consent of the Governments of Ontario and Quebec. Such consent was obtained, and payments were made by the Dominion Government to T., and to the suppliant to whom the claim was assigned, and the suppliant proceeded by petition of right to recover the balance; the Government demurred on the ground that the claim was not founded upon a contract and the petition would not lie.

Judge FOURNIER, in the Exchequer Court, overruled the demurrer, and on appeal to the Supreme Court of Canada,

*Held* (reversing the judgment of FOURNIER, J., FOURNIER and HENRY, JJ., dissenting), that there being no previous indebtedness from New Brunswick, Canada or the Dominion to T. shown, the order-in-council did not create a debt, and petition would not lie.

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Appeal allowed with costs.  
*Blair, Q.C. (Hogg with him), for appellant.*  
*Lafamme, Q.C. (McIntyre with him), for respondent.*

Quebec.]

## LEFEBVRE V. CITY OF QUEBEC.

16 *Vict. ch. 100*—30 *Vict. ch. 2, sec. 2*—*North Shore Railway Company—Authority to use streets—Damages—Non-liability of corporation.*

By 16 *Vict. ch. 100, P. Q.*, the North Shore Railway Company was authorized to construct a railway to connect the cities of Quebec and Montreal, with the restriction that the railway was not to be brought within the limits of the city, without the permission of the corporation of the city expressed by a by-law.

In July, 1872, the city council, by resolution, had given to the North Shore Railway Company the liberty to choose one of the streets to the north of St. Francis Street, which had been at one time chosen for that purpose. In 1874 the city council were informed by the company that the company had located the line of the railway in Prince Edward Street; but the corporation did not take any further action in the matter.

In 1875 the company being unable to carry out its enterprise, the railway was transferred to the Government of the Province of Quebec by a notarial deed, and the transfer was ratified by 39 *Vict. ch. 2*, and by that Act the legislature was authorized to construct the road to deep water in the port of Quebec.

After the passing of this Act the Provincial Government caused the road to be completed, and it crossed part of the city of Quebec from its western boundary by passing through Prince Edward Street along its entire length.

The road was completed in 1876. In 1878 L. (the appellant), owner of several houses bordering on P. E. Street, sued the corporation of the city of Quebec for damages suffered on account of the construction and working of the railway. The corporation pleaded no liability.

*Held* (affirming the judgment of the Court below), that the corporation was not liable.

Appeal dismissed with costs.

*Irvine, Q.C., and Larue, Q.C., for appellant.*  
*Pelletier, Q.C., for respondents.*

Quebec.]

## KNIGHT V. WHITFIELD.

*Public company*—31 *Vict. ch. 25, ss. 11, 17, 19, 20 (P. Q.)*—*Action for calls—Increased capital—By-law—Insufficient notice.*

In virtue of 31 *Vict. sec. 11, ch. 25 (P. Q.)*, at a meeting of the directors of the St. J. Stone Chinaware Co., a by-law was passed increasing the capital stock of the company by the issue of 250 additional shares of \$200 each, payable by monthly instalments of ten per cent. each. At the general meeting of the shareholders, subsequently held for the election of directors and other business, the said by-law was confirmed.

In an action brought by the assignee of the company (insolvent) against W., an original stockholder and director, for calls on twenty shares of new stock, the only evidence relating to the adoption of the by-law and the calls having been made on W. were the minutes of the meeting of the directors and of the general meeting of the stockholders, and the Superior Court held there had been no calls made. This judgment was affirmed by the Court of Queen's Bench (appeal side), and on appeal to the Supreme Court of Canada it was

*Held* (affirming the judgments *a quo*), that no calls had been made on W., and therefore he was not liable.

*Per* FOURNIER and HENRY, JJ., there was no evidence that the by-law had been confirmed by two-thirds of the shareholders in amount at a special meeting called for the purpose of increasing the stock, as provided by 31 *Vict. ch. 25, sec. 11*, and on that ground also the appeal should be dismissed.

Appeal dismissed with costs.

*Robertson, Q.C., for appellant.*

*Geoffrion, Q.C., and Paradis, for respondent.*

Ontario.]

## HUNTER V. CARRICK.

*Infringement of patent—New invention—Combination—Want of novelty.*

A patent was obtained for a baker's oven, the patentee claiming as his invention the following:—



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1. A fire-pot or furnace placed within a baker's oven, below the sole thereof, and provided with a door situated above the grate.

2. A fire-pot or furnace placed within a baker's oven, provided with a door above the level of the sole of the oven, and connected with the said furnace by an inclined guide.

3. In a baker's oven a flue leading from below the grate to the main flue.

4. A baker's oven provided with a circular tilting grate, situated above the sole of the oven, and provided with a door.

5. In a baker's oven a cinder grate placed beneath the fire grate in combination with a flue leading from below the grate to the main flue.

And in the specifications the patentee says: "What I claim as my invention is—in combination with a baker's oven—a furnace set within the oven, but below the sole.

*Held* (affirming the judgment of the Court of Appeal, STRONG and HENRY, JJ., dissenting), that the claim for novelty in the above patent rested upon the position of a door above the grate (all the other parts having been used in bakers' ovens before), and that one alone was not sufficient to enable a patent to issue.

Appeal dismissed with costs.

*Cassels*, Q.C., for the appellant.

*Robinson*, Q.C., for the respondent.

Ontario.]

LONG ET AL. V. HANCOCK.

*Interpleader issue—Insolvent Co.—Chattel mortgage—Preference over other creditors—Intention to prefer.*

The Hamilton Knitting Co., being indebted in a large amount to the appellants, and believing that their charter did not permit them to give a mortgage on their property to secure an overdue debt, agreed to give such mortgage in consideration of an advance by appellants of more than the amount of the debt, the actual amount to be returned to the mortgagees. This arrangement was carried out, and the balance of the amount advanced on the mortgage, after paying the debt, was put into the business of the company.

At the time this was done the company believed that by getting time from these creditors they would be able to carry on their

business and avoid failure. This hope was not realized, however, and they shortly after stopped payment, and in consequence, certain of their creditors, the above respondents, obtained judgments on their respective claims and issued executions. The property secured by the said chattel mortgage was seized under these executions, and this interpleader issue was brought to test the title to such property.

The learned Chancellor, before whom the issue was tried, gave judgment for the execution creditors, holding the mortgage void under the statute relating to fraudulent preferences, and the Court of Appeal sustained this judgment by a division of the Court. On appeal to the Supreme Court of Canada,

*Held*, that as the company *bona fide* believed that by getting an extension of time from the appellants they would be able to continue their business, it could not have been given with a view of preferring the creditors and of defrauding the others, and therefore the appellants are entitled to judgment.

*Crerar*, for appellant.

*Martin*, Q.C., and *Furlong*, for respondent, *Hancock*.

*A. D. Cameron*, for respondent, *Fairgrieve*.

Ontario.]

CANADA PUBLISHING CO. ET AL. V. GAGE.

*Trade mark—Right to use one's own name—Goods designated by one's own name sold to deceive public.*

Gage carried on business in partnership with appellant, Beatty, a valuable asset of the business being a series of copy books designed by Beatty, and sold under the name of "Beatty's Headline Copy Books." Beatty retired from the firm, receiving \$20,000 for his share in the business, and Gage subsequently registered as a trade mark the word "Beatty" in connection with the copy books.

. After the dissolution, Beatty, under an agreement with the Canada Publishing Co., prepared a series of copy books which were sold under the name of "Beatty's New and Improved Headline Copy Books," and a suit was brought by Gage to restrain the appellants from selling the said books.

*Held* (affirming the judgment of the Court of Appeal, HENRY and TASCHEREAU, JJ., dissent-

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ing), that appellants had no right to sell "Beatty's New and Improved Headline Copy Book" in any form or with any cover calculated to deceive purchasers into the belief that they were purchasing Gage's books.

Appeal dismissed with costs.

*Robinson, Q.C., and MacLennan, Q.C., for Canada Publishing Co., appellants.*

*Barwick, for Beatty.*

*Blake, Q.C., and Lash, Q.C., for respondent, Gage.*

Ontario.]

### O'SULLIVAN V. HARTY.

*Administrator, acts of—Acting by agent—  
Next of kin—Costs.*

The plaintiff wished to administer to the estate of his brother in the county of Westmoreland (N. B.), but was unable to give the necessary administration bond, until the defendant W. and one J. agreed to become his bondsmen, securing themselves by having the estate placed in the hands of the defendants. A portion of the estate consisted of some English railway stock which the defendants wished to convert into money, but plaintiff would not assist them in doing so.

In passing the accounts of the estate in the Probate Court of Westmoreland county it was found that there were several persons entitled to participate as next of kin of the deceased, and the respective amounts due the several claimants were settled by the Court.

Owing to the plaintiff's refusal to join in realizing the stock, however, the defendants were unable to pay some of these parties their respective shares, and finally plaintiff filed a bill to compel the defendants to pay him his portion of the estate with \$1,000, which he claimed as commission, and also to hand over to him the shares of the next of kin. After the hearing a decree was made directing the estate to be disposed of by the defendants, and that they were entitled to their costs as between solicitor and client, which could be retained out of the plaintiff's share of the estate.

On appeal PROUDFOOT, J., reversed that portion of the decree which made the plaintiff's share of the estate liable for the defendant's costs, but the Court of Appeal restored

the original judgment. On appeal to the Supreme Court of Canada,

*Held* (affirming the judgment of the Court of Appeal), that as the misconduct of the plaintiff had caused all the litigation, the Court of Appeal had acted rightly in refusing to compel any of the other next of kin to bear the burden of the costs.

Appeal dismissed with costs.

*O'Sullivan, for appellant.*

*MacLennan, Q.C., and Whiting, for respondents.*

Ontario.]

### WHITE V. CURRIE.

*Solicitor and client—Negligence—Omission to include property in mortgage—Omission to register—Laches by client.*

C., a member of defendant's firm of solicitors, was employed to prepare a mortgage for W., who gave instructions partly verbal and partly written. Nearly six years after W. brought an action against the firm for neglecting to register the mortgage, and shortly before the trial asked to be allowed to add to his statement of claim an allegation of neglect to include a certain property in the mortgage, which he claimed to have been included in the instructions. There was conflicting evidence at the trial as to the instructions, and judgment was given for the defendants, which judgment was sustained by the Divisional Court and by the Court of Appeal. On appeal to the Supreme Court of Canada,

*Held* (affirming the judgments of the Courts below), that as the plaintiff had delayed for so long in prosecuting his claim against the defendants, and the judge who heard the case had decided against him, this Court would not interfere with that judgment affirmed by two Courts.

Appeal dismissed with costs.

*Osler, Q.C., and Laidlaw, for appellant.*

*Kerr, Q.C., for respondent.*

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[Sup. Ct.]

Ontario.]

GRIP PRINTING AND PUBLISHING CO.  
v. BUTTERFIELD.

*Patent—Assignment of interest in—Subsequent infringement—Estoppel—Want of novelty.*

C. obtained a patent for The Paragon Black Leaf Check Book, and in his specification claimed as his invention, "in a black leaf check book of double leaves, one-half of which are bound together, while the other half fold in as fly-leaves torn out; the combination of the black leaf bound into the book next the cover and provided with tape across its ends, the said black leaf having the transferring composition on one of its sides only."

A half interest in this patent was assigned to the defendant with whom C. was in partnership, and on the dissolution of such partnership, said half-interest was re-assigned to C. who assigned the whole interest in the patent to plaintiffs.

Prior to the said dissolution the defendant obtained a patent for what he called "Butterfield's Improved Paragon Check Book," claiming as his invention the following improvements on check books previously in use:—1st. A kind of type; 2nd. The membrane hinge for a black leaf, the whole bound by an elastic band to the ends or sides of the lower cover; and 3rd. A totalling sheet;" and after the dissolution proceeded to manufacture check books under his said patent. Plaintiffs brought suit for an injunction, claiming that their patent was infringed, and on the hearing before the Chancellor obtained the relief prayed for. The Court of Appeal, however, reversed the judgment of the Chancellor, holding the plaintiff's patent to be void for want of novelty. On appeal to the Supreme Court of Canada,

*Held* (reversing the judgment of the Court of Appeal), that the patent of the plaintiffs under which they claimed was a valid patent, and as there was no doubt that it was infringed by the manufacture and sale of defendant's books, the judgment of the Chancellor should be restored.

Appeal allowed with costs.

W. Cassels, Q.C., for appellants.

Kingsford, for respondent.

Ontario.]

ST. LAWRENCE AND OTTAWA RY. CO.  
v. LETT.

*Railway company—Negligence—Death of wife by—Damages to husband as administrator—Benefit of children—Loss of household services—Care and training of children.*

Although on the death of a wife, caused by negligence of a railway company, the husband cannot recover damages of a sentimental character; yet the loss of household services, accustomed to be performed by the wife, and which would have to be replaced by hired services, may be a substantial loss for which damages may be recovered, and so also may be the loss to the children of the care and moral training of their mother.

Appeal dismissed with costs.

Robinson, Q.C., for appellants.

McCarthy, Q.C., and O'Gara, Q.C., for respondent.

Ontario.]

TORONTO GRAVEL ROAD, ETC., COMPANY v.  
COUNTY OF YORK.

*Agreement with municipality—Construction of tramway—Traction engine—Agreement to withdraw and discontinue use—Right to use steam engine under.*

An agreement was entered into under the authority of an act of the Legislature of Ontario, between the municipality of York and the Toronto Gravel Road Co., for a right to construct a tramway from their gravel pits to the City of Toronto. One of the clauses of the agreement was as follows: "So soon as this agreement shall have been ratified by the said corporation, the said company shall forthwith withdraw their said traction engine from the public highway of the said county, and shall discontinue the use and employment of the said traction engine, and of any other traction engine upon or along such public highways."

The company claimed the right to put steam engines upon the road, over such public highway, notwithstanding the above clause in their agreement.

*Held* (affirming the judgment of the Court of Appeal), that the use of steam engines was an infraction of the said clause.

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Appeal dismissed with costs.

*Robinson, Q.C., Osler, Q.C.,* for appellants.

*Kerr, Q.C., and Cassels, Q.C.,* for respondents.

Ontario.]

KELLY V. IMPERIAL LOAN INV. CO.

*Mortgage—Assignment of equity of redemption in trust—Reconveyance—Foreclosure against trustee—Subsequent sale—Power of sale, Exercise of, by deed after foreclosure.*

Kelly gave a mortgage of leasehold premises to respondents, with covenant authorizing them to sell on default, with or without notice to the mortgagor, and at either public or private sale. The mortgage conveyed the unexpired portion of the current term and "every renewed term." Afterwards Kelly conveyed the equity of redemption in the mortgaged premises to one O'S. in trust, to carry out certain negotiations, and left the country. During his absence the lease of the ground expired, and it was renewed in the name of O'S. Default having been made in payment of interest under the mortgage, a suit was brought against O'S. for foreclosure, prior to which O'S. having been threatened with such suit, reconveyed equity of redemption to Kelly, but deed was never delivered. O'S. then filed an answer and disclaimer of interest in said suit, which he afterwards withdrew and consented to a decree, and the mortgagees subsequently sold the mortgaged premises to the defendant Damer for a sum less than the amount due on the mortgage; the deed to Damer recited the proceedings in foreclosure, and purported to be made under the decree.

Kelly brought suit to have the decree of foreclosure opened and cancelled, the deed to Damer set aside, and to be allowed to come in and redeem the premises.

*Held* (affirming the judgment of the Court of Appeal, STRONG, J., dissenting), that even if the decree of foreclosure were improperly obtained, and consequently void, yet the sale to Damer was a proper exercise of the power of sale in the mortgage, and should be sustained, and that it passed the renewed term which was included in the mortgage.

Appeal dismissed with costs.

*McCarthy, Q.C., and Plumb,* for appellant.

*MacLennan, Q.C., and Galt,* for respondents.

## COURT OF APPEAL.

C. C. Dufferin.]

[Dec. 23, 1885.

PETTIGREW V. THOMAS.

*Interpleader—Trial of issue by jury—Evidence for the jury.*

Under an execution issued on a judgment recovered by one T. against S. B. S., a married woman, wife of one J. J. S., the sheriff seized a certain mare as the property of the judgment debtor. Upon claim made by the plaintiff, an interpleader order issued directing the trial of an issue in the usual form by a jury in the County Court. Upon the trial, the learned judge held that the plaintiff had failed to make out his title by any evidence proper for the consideration of a jury, and he accordingly withdrew the case from them, and directed judgment for the defendant. He also subsequently refused an order *nisi* for a new trial, and this appeal was brought from his judgment.

It appeared that the plaintiff claimed title to the mare under a purchase from J. J. S., or his wife, for valuable consideration actually paid. There was no bill of sale, but the plaintiff put in evidence to prove that there was an immediate delivery followed by an actual and continued change of possession sufficient to satisfy the statute.

*Held*, that the question of delivery and change of possession is one proper to be submitted to the jury with proper explanations by the judge as to the object of the statute and the meaning of terms contained therein, and that the case should not have been withdrawn.

*Scribner v. McLaren*, 2 Ont. R. 265, approved.

*S. H. Blake, Q.C., and Elgin Myers,* for the appellant.

*Moss, Q.C.,* for the respondent.

C. C. Elgin.]

[Dec. 23, 1885.

CHING V. JEFFERY.

*Promissory note—Equity affecting transferee taking subsequent to maturity.*

Action upon a promissory note made by defendant, payable to one W. G. A. or bearer, and transferred by W. G. A. to the plaintiff several months after it became due. The defence was that after maturity of the note, and while W. G. A. was still

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the holder, it was agreed between defendant and W. G. A., and one R. J. (who was also interested in the note), that the defendant should supply W. G. A. and R. J. and their families with board and lodging, the value of which should be applied in payment or reduction of the note. The rate at which such board and lodging should be supplied was not agreed on, nor did it appear that there had been any subsequent accounting together, or settlement of the amount by the parties. The jury found the fact of such agreement, and that the amount due under it was \$100; also that the plaintiff was a *bond fide* holder of the note for value, and without notice. The board, etc., had been supplied before the plaintiff became the holder. The learned judge of the County Court held that this was merely the subject of a set-off, which might have been pleaded if W. G. A. were plaintiff, and that "the defence set up did not affect the equities, if any, which subsisted between the original parties to the note arising out of the transactions in which it was given."

Upon appeal to this Court,

*Held*, that W. G. A.'s title to dispose of the note after its maturity became subject by the agreement to the defendant's right to have the amount due for board, etc., applied in reduction of the note in accordance with the agreement, and that such right was an equity attaching to the note in the plaintiff's hands. *Canadian Bank of Commerce v. Ross*, 22 C. P. 491, distinguished, and judgment reversed.

*Ermatinger*, Q.C., for the appellants.

*Aylesworth*, for the respondents.

Proudfoot, J.]

[Dec. 23, 1885.]

McVEAN v. TIFFIN.

*Mechanics' lien—Mortgage—Priority of registered mortgage over lien subsequently registered.*

This was an action under the Mechanics' Lien Act, R. S. O. cap. 120, brought by the contractor against the owner to enforce a lien. By the judgment, a reference was directed to the Local Master at Chatham in the usual form, to enquire whether any person or persons, and who other than the plaintiffs, except prior mortgagees, had any encumbrance, etc., upon the premises in question. Subsequently the Master made a number of persons, including the appellants, parties in his office, and

caused them to be served with a notice T, which notice, however, wrongly recited the judgment as directing an enquiry as to encumbrances generally, without the exception as to prior mortgages. Upon being served, the appellants petitioned to discharge the Master's order upon the ground that they were prior mortgagees, and hence not necessary or proper parties to the action.

It appeared that the appellants registered their mortgage before any of the work was done or materials supplied for which the plaintiffs claimed, and advanced the full amount of the mortgage money some months before the plaintiffs' lien was registered, though not all of it before the plaintiffs had done work and supplied materials. The plaintiffs contended for priority to the mortgagees as far as regarded advances made after the commencement of the work. The plaintiffs did not, however, allege that the mortgagees had any actual notice of their lien before it was registered. The learned judge in the Court below dismissed with costs the petition of the appellants, on the ground that it was proper for the Master, under the judgment, to enquire as to moneys advanced upon the mortgage subsequent to the commencement of the work in respect of which the lien arose.

*Held*, that the appellants' claim was prior to that of the plaintiffs, and that they were not proper parties to the action, being excepted by the terms of the judgment, nor was the Master justified in entering upon any enquiry as to their advances.

*Richards v. Chamberlain*, 25 Gr. 402, and *Hynes v. Smith*, 27 Gr. 150, referred to. Appeal allowed.

*Bayly*, Q.C., for the appellants.

*Clement*, for the respondents, plaintiffs.

COMMON PLEAS DIVISION.

[December 19, 1885.]

FRYE v. MILLIGAN.

*Hire contract - False representation - Deceit - Breach of warranty - Damages.*

The defendant delivered a piano to the plaintiff on what is known as a hire contract, which provided that the defendant did "neither part with the said piano," nor did the plaintiff "acquire any title" to it, until a note for \$400, which was given for the price, was fully paid, and that on default of payment

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of the note or any of the instalments, the defendant was authorized to enter the plaintiff's premises and take and remove the piano, and collect all reasonable charges for its use. The price of the piano was \$500, which was payable by crediting \$100 on an old piano taken in exchange and the balance in monthly instalments, the note being payable by like instalments. The note was discounted by a private banker, the defendants endorsing it. The instalments were not met as they fell due and payment was enforced, and when action was brought there were instalments in arrear.

The plaintiff sued for fraudulent misrepresentation, and for general damages for breach of an implied warranty; the alleged misrepresentations or warranties being that the piano was worth \$500, that it was a first-class instrument, and as good as any Steinway or Chickering piano.

*Held*, that the plaintiff could not succeed as to the false representation, for the evidence showed that after she discovered the piano was not as was represented she did not disaffirm the contract, or offer to return the piano, but treated the contract as subsisting. Nor could she recover in an action for deceit, for she failed to show that the defendant did not believe the statements made to be true, or that the statements were made recklessly; also, no damages were shown; and moreover, though not deciding the point, the statements were such as are properly styled simple commendations.

*Held*, also, that as the property had not passed, an action for the breach of warranty would not lie.

*Falconbridge*, Q.C., for the plaintiff.

*Meredith*, Q.C., for the defendant.

#### HILLIARD V. GEMMELL.

*Landlord and tenant—Tenant holding over after expiration of term—Rent payable therefor.*

Where a party, having held for a term at a certain rent, continues to occupy after the expiration of his term, it is presumed, if there is no evidence to the contrary, that he holds at the former rent.

In this case the evidence showed that the plaintiff allowed the defendants to remain in occupation for two months after the expiration

of their term, and made no demand for an increased rental; and he was therefore held to have agreed to allow defendants to remain on the terms of paying the rent reserved by the expired lease, but as they received notice that if they desired to remain on longer they must pay an increased rental, they were held chargeable with such increased rental.

*Dumble*, for the plaintiff.

*Edminson*, and *Wallace Nesbitt*, for the defendants.

#### MCCANN V. PRENEVEAU.

*Malicious prosecution—Termination of criminal proceedings—Original indictment—Admissibility of—Slander, evidence of—Amendment.*

Action for malicious prosecution and slander. The malicious prosecution arose out of an indictment preferred at the Quarter Sessions. In proof of the termination of the criminal proceedings, the plaintiff produced in evidence, which was admitted subject to objection, the original indictment endorsed "no bill."

*Held*, that this was not sufficient, but that a record should have been regularly drawn up and an examined copy produced.

*Held*, also, that evidence of the motives which induced the defendant to lay the charge before the magistrate is properly receivable, and should not have been rejected as was done here.

There was no evidence to sustain the slander as laid, but an amendment was allowed to comply, as was alleged, with the evidence. The only objection made by defendant was that he should be allowed to examine the witnesses again on the new count. An objection in term to the amendment was, therefore, not allowed.

The evidence in support of the amended count consisted, not of statements voluntarily made by the defendant, but of answers to questions put to him, after he had laid a charge against the plaintiff, as to what the charge was.

*Held*, that this would not be sufficient to base an action of slander; and, moreover, the evidence itself failed to substantiate the slander.

*G. T. Blackstock*, for the plaintiff.

*Osler*, Q.C., for the defendant.

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## CLARKSON V. SNIDER.

*Stock—Pledge by broker—Recovery of purchase value.*

On 28th February, 1884, and 1st May, 1884, respectively, a firm of brokers was employed by defendant to purchase ten several shares of Federal Bank stock, at the respective rates of \$138.25 and \$126, with  $\frac{1}{4}$  per cent. commission. The price paid by the brokers was to be repaid on demand, with interest at six per cent., and the stock held by the brokers as collateral security for repayment; the brokers also receiving a ten per cent. margin. The brokers took the stock in their own names, and then transferred it to a loan company, together with other stock of the same character, the transfer, though absolute in form, being in fact a pledge to secure the repayment of a much larger amount than the sum payable by defendant. The pledge had no reference to the transaction with defendant, but was for the brokers' own purposes. The defendant was not informed of the transfer, and calls for further margins were made on him from time to time as the stock fell. On 27th June, 1884, the brokers suspended payment, at which date the stock had fallen to 82 or 18 below par; and on the 26th December they made an assignment to the plaintiff for the benefit of creditors. Neither at the time of the suspension or assignment was any unpledged or unhypothecated stock held for, or held by, the brokers, nor was any transferred to the plaintiff. There was only the right vested in plaintiff to redeem any stock that might have remained undisposed of by the pledgees. On 4th August, 1885, after the stock had by legislative enactment been reduced to one half its original par value, or from \$100 to \$50, the plaintiff offered to transfer twenty shares of the reduced stock, which defendant refused to accept. The plaintiff then brought an action against the defendant to recover the alleged balance due on the stock.

*Held*, there could be no recovery.

When as a jury case the learned judge at the trial enters a nonsuit, a notice of motion and order *nisi* is the proper mode of moving against the nonsuit.

*F. Arnoldi*, for the plaintiff.

*Fullerton*, and *Cook*, for the defendant

## UDY V. STEWART.

*Seduction—Survival of action—Evidence, admissibility of—O. J. Act—Rule 383.*

In an action of seduction the plaintiff obtained a verdict, and judgment was directed to be entered in his favour. In the following sittings of the Divisional Court an order *nisi* was obtained to set aside the verdict and judgment, and to enter judgment for the defendant on the ground of the improper admission of the evidence of the seduced girl by reason of her incompetency to give evidence. The order was set down, and on its coming on for argument, it appeared that after the order had been served the plaintiff had died.

*Semble*, that, under O. J. A. Rule 383, the action abated by reason of the death of the plaintiff: but,

*Held*, that the girl's evidence was improperly received, as it clearly appeared that she was not capable of understanding or appreciating the nature of an oath, or the obligation she assumed in swearing to tell the truth, and was therefore incompetent to give evidence, and without her evidence the verdict could not be supported.

Under the circumstances, an order was granted staying further proceedings in the action.

*G. T. Blackstock*, for the plaintiff.

*Osler, Q.C.*, and *Barron*, for the defendant.

## REGINA V. BENT.

*Criminal law—Evidence—Admissibility.*

The prisoner was indicted along with W., the first count charging W. with forging a circular note of the National Bank of Scotland, and the second with uttering it knowing it to be forged. The prisoner was charged with being an accessory before the fact. Evidence was admitted showing that two persons named F. and H. had been tried and convicted in Montreal of uttering similar forged circular notes; that these notes were printed from the same plate as those uttered by W.; that the prisoner was in Montreal with F., they having arrived and registered their names there together at the same hotel, and occupied adjoining rooms. At the trial in Montreal, after F. and H. had been convicted on one charge, they admitted

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their guilt on several others. It was also proved that a number of these circular notes were found on F., and a number on H., and these letters were produced on the trial of the prisoner.

*Held*, that the evidence was properly received in proof of the guilty knowledge of the prisoner.

*MacMahon*, Q.C., for the Crown.

*Bigelow*, for the defendant.

#### REGINA V. McDONALD ET AL.

*Criminal law—Separate indictments for similar offences—On trial of one of the indictments evidence received of charge on other—Admissibility.*

Two indictments were preferred against the defendants for feloniously destroying the fruit trees respectively of M. and C. The offences charged were proved to have been committed on the same night, and the injury complained of was done in the same manner in both cases. The defendant was put on his trial on the charge of destroying M.'s trees; and evidence relating to the offence charged in the other indictment was admitted, as showing that the offences had been committed by the same person.

*Held*, that the evidence was properly received.

*Johnston*, Deputy Attorney-General, for the Crown.

*G. T. Blackstock*, for the defendants.

#### FRIENDLY V. CANADA TRANSIT CO.

*Sale of goods—Consignor and consignee—Property passing—Right of action.*

L. gave a verbal order to the plaintiffs for certain goods exceeding in amount \$400, which were shipped on defendant's steamer. The goods were insured by the plaintiffs, loss, if any, payable to them. The vessel arrived, and there being no wharf, a sort of gangway was constructed by means of which the cargo was discharged. One of the cases was duly landed and received by L., one slipped from the gangway into the water and was damaged, while the third remained on board in consequence of the purser requiring payment of the freight, not only on these cases, but on a variety of other goods consigned to L. before

he would deliver it up, which L. refused to do unless he had an opportunity of checking over the goods. Before the dispute was settled the steamer left, and, a few days afterwards, was lost with this case of goods.

*Held* (GALT, J., dissenting), that the property in these cases of goods had passed to the consignee L., and that the plaintiffs could not maintain an action for the loss and damage done to the goods.

*D. E. Thomson*, for the plaintiffs.

*Tilt*, Q.C., for the defendants.

#### CHANCERY DIVISION.

Proudfoot, J.] [Nov. 11, 1885.

CLARKE V. UNION FIRE INS. CO.—SHOOLBRED'S PETITION.

*Company—Winding up—45 Vict. c. 23, (D.)—47 Vict. c. 39, (D.).*

There is nothing in 47 Vict. c. 39, s. 2, to limit its application to companies being wound up at the date of 45 Vict. c. 23, (May 17th, 1882.) It applies to a company in liquidation, or in process of being wound up. Liquidation would apply to a company insolvent, though not technically being wound up, and against which proceedings are being taken to realize its assets and pay its debts.

Notice need be given to the company only, as was done in this case, and perhaps also to creditors, who have brought actions against the company, and whose actions would be stayed by the winding up order.

It is not correct to say that there is no power to refer the appointment of a liquidator under these Acts to the Master.

Proudfoot, J.] [November 11, 1885.

RATTE V. BOOTH.

*Riparian proprietor—Navigable stream—Reservation in patent.*

J. A. was the patentee of a certain water lot on the River Ottawa, and the description covered the lot, and two chains distant from the shore, but the patent contained a reservation "of the free uses, passage and enjoyment of, in, over and upon all navigable waters that shall or may be hereafter



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found in or under, or be flowing through or upon any part of the said parcel of land hereby granted." J. A. afterwards granted the said water lot to A. R., but the description in the deed only went to the water's edge.

In an action by A. R., against some owners of saw-mills on the river above his lot to prevent them from throwing sawdust, slabs, etc., into the river to his detriment in the use of his water lot, it was

*Held*, that the Ottawa River is a navigable stream in fact, and a riparian proprietor as such would, therefore, only be entitled to the water's edge. The reservation in the patent still leaves that part of the river a navigable stream, and does not convey an exclusive right to the grantee of the Crown, and being such, the conveyance to the water's edge would not carry the right further than to that edge. It is only by the special grant that a title passed to the two chains, and still left the river with all its characteristics of a navigable stream. Any structure on the water, even if erected for twenty years, would be an interference with the free use of the river reserved by the Crown, and the right to do so could not be acquired in that way. The action was therefore dismissed.

*Cassels*, Q.C., for the plaintiff.

*Gormully*, for the defendants, Bronson and Weston.

*McCarthy*, Q.C., and *Christie*, for the other defendants.

Proudfoot, J.]

[Nov. 18, 1885.]

#### SCHRADER V. LILLES.

*Agreement—Cigarmakers' union—Consideration—Restraint of trade—Penalty—Liquidated damages.*

By agreement, dated May 27th, 1885, certain members of a Cigar Manufacturers' Association, after reciting that it had been agreed that they "should become severally bound to one Schrader in the sum of \$500 as liquidated and ascertained damages in case any of them shall at any time during the continuance of this agreement, either directly or indirectly, buy or sell any cigars marked or branded with the labels of the Cigarmakers' Union, or shall use or allow to be used in connection with the manufacture of cigars by him, any Cigarmakers' Union labels, or any label sanctioned by the Cigarmakers' Union, or any label in any way

indicating that his cigars have been manufactured by union men, or shall permit or allow any Cigarmakers' Union, or any union, or any set of men, to compel him to hire or employ union men only, or to dismiss any employé," went on to covenant, each for himself, that "he will, in case he shall at any time hereafter violate any of the foregoing stipulations by buying or selling cigars marked or branded with the labels of the Cigarmakers' Union, etc. (as in above recital); he shall immediately pay to the said Schrader the sum of \$500, the intention being that in case of a violation of all or any of the stipulations, provisoes or conditions aforesaid by any of them, he, the said party so offending shall immediately forfeit and pay to the said Schrader the full sum of \$500 because of his so offending, as liquidated and ascertained damages (and not as a penalty); the intention also being that the entire sum of \$500 shall be the amount of the ascertained and liquidated damages of any violation or breach whatever of any of the stipulations, provisoes or conditions aforesaid on the part of any one of the said" (covenanting parties).

*Held* (1), that the mutual obligations imposed by the contract constituted a sufficient consideration.

(2) That the agreement was not invalid as in restraint of trade and contrary to public policy.

(3) That the plaintiff was entitled to recover the sum named in the agreement as liquidated damages.

Divisional Court.]

[December 3, 1885.]

#### IN RE CLEATOR.

*Will, devise—Estate in fee tail or fee simple—Vendor and purchaser—R. S. O. c. 109.*

M. C. by her will devised as follows: "First I give and devise to my grandson, J. C., the farm . . . to have and to hold the same, and every part thereof, for and during his natural life and, after his death, to the heirs of his body, should he leave any such heirs surviving, and in the event of his leaving no such heirs, then the same and every part thereof is to be divided as fairly and equally as may be amongst . . . to have, and to hold the same to them, their heirs and assigns forever; but my will

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and desire is that my said grandson J. C. shall not have or go into the possession . . until he shall have attained the age of twenty-five years, or five years after my death Secondly I give and bequeath to my son J. C., \$100 annually, during his natural life, the same to be paid to him quarterly . . and to be a charge on the farm or homestead above devised to his said son John."

*Held* (reversing the decision of Proudfoot, J.,) That the effect of the limitations was to give J. C. an estate tail which he had barred as the result of his dealings with the land by way of conveyance. *Greenwood v. Verdon*, 1 K. & J. 74, distinguished. *Per* PROUDFOOT, J. "Heirs of the body" means heirs of the body living at the death of J. C. J. C. took only a life estate, and his heirs of his body would take as purchasers a fee simple. If at J. C.'s death there were no heirs of his body the estate would go to his then living brothers and sisters, in fee simple. *Eden v. Wilson*, 4 H. L. C. 257, distinguished.

*Beck*, for the vendor.

*Beverley Jones*, for the purchaser.

Ferguson. J.]

[Dec. 3, 1885.]

# KEYS V. EMARD.

*Mortgage—Subsequent parol agreement varying same—Short form deed—Covenant for quiet possession.*

Action on a mortgage given to secure a balance of the purchase money for the land from the plaintiff, the first instalment of which was overdue and unpaid.

The defendant set up that he only accepted the deed from the plaintiff, or executed the mortgage sued on, upon her promising to give him possession at a named date, because he relied on representations of the plaintiff, that no one else was in possession, or had any claim to the land, and that she could give him possession at any time, whereas in fact, as the plaintiff knew, one L. was in possession and claimed a right to be so, and the plaintiff was unable to give up possession at the time named, and when after accepting the deed, and giving the mortgage, the defendant threatened the plaintiff with proceedings to recover possession and damages for breach of the agreement, and for the false representations aforesaid, the plaintiff agreed that in consideration of the defendant forbearing to take such proceedings for a reasonable time, no

instalment should be due under the mortgage, until such time after the time named therein, as equalled the time beyond the time originally fixed for delivery of possession when possession should be actually delivered to the defendant, and that she should pay defendant such damages as he should sustain from non-delivery of possession at the proper date. The defendant further set up that he forbore proceedings accordingly, and that possession was not really delivered till such a date that, by virtue of above transactions, nothing would be due under the mortgage till January 1st, 1886.

The defendant having proved the truth of these allegations,

*Held*, that as to the parol agreement to deliver possession by a named date, this being a collateral agreement, and made in consideration that the defendant would enter into the transaction as he did, would, according to the statement of the law by MELLISH, L.J., in *Erskine v. Adeane*, L. R. 8 Ch., at p. 766, have been a binding agreement, notwithstanding the execution of the deed and mortgage, were it not that the conveyance to the defendant containing the ordinary short form covenant for quiet possession, the parol agreement was contradictory to the meaning of this, as shown by the column in the statute containing the extended form of the covenant, or if not contradictory, added another term to the deed, and this was fatal to giving effect to the parol agreement.

*Held*, however, that the forbearance to sue, since the defendant *bona fide* believed he had a good cause of action for the false representations and the breach of the agreement, formed a good consideration for the parol agreement to postpone payments under the mortgage, and the plaintiff was bound by it, and nothing, therefore, being due to the plaintiff, the action must be dismissed.

*O'Gara*, Q.C., for the plaintiff.

*J. J. Gormully*, and *F. MacDougall*, for the defendant.

Ferguson, J.]

[Dec. 14, 1885.]

# BOGART V. TOWNSHIP OF SEYMOUR.

*Medical practitioner—Compensation for services—By-law appointing—Absence of fixed salary—Local Board of Health.*

Action for compensation for medical services, rendered on order of Local Board of Health of defendant township, and of the defendants, the corpora-

Chan. Div.]

NOTES OF CANADIAN CASES.

[Prac.]

tion. It appeared that plaintiff was by by-law of December, 1884, appointed medical health officer of the township, under 47 Vict. c. 38, s. 20, but the by-law fixed no salary, as might have been done under that section.

*Held*, that the law would fix the salary at a reasonable sum, regard being had to the services to be performed and performed by the plaintiff, and the plaintiff was entitled to a reference to the Master to fix the amount.

The local Board of Health had been appointed under by-law of January 19th, 1885, which named three individuals as the Board. It did not, however, state that they were ratepayers, as required by 47 Vict. c. 38, s. 12 ss. 2, nor did it mention the officers which the said sub-section makes *ex officio* members of the Board.

*Held*, that at all events where the question arose, not on a motion to quash the by-law, but incidentally as here, the by-law should not be held invalid for these reasons.

*W. Cassels, Q.C., and Lynch, for the plaintiff.*

*Osler, Q.C., and Caldwell, for the defendant.*

Ferguson, J.]

[December 15, 1885.]

DEMOREST V. THE GRAND JUNCTION R.  
W. CO. ET AL.

*Arbitration—Compensation for land taken for R. W.  
Co.—Issue pleadings.*

D. brought an action to compel a R. W. Co. to arbitrate, to ascertain the value of certain land taken for the purposes of the R. W. Co., and after the service of the writ, the Co. served a notice to arbitrate, and after arbitration an award was made by two of the arbitrators, but was subsequently set aside by the Court, as invalid. D. then proceeded with his action, and the R. W. Co. pleaded that the arbitrators fixed a time for the making of the award, but did not make any within the time limited, and did not enlarge the time, and that, therefore, the sum of \$400 offered by the R. W. Co. before proceedings taken was the correct amount of the compensation.

The learned judge found on the evidence that no time had been fixed, and that this was a different case from one in which the time had been fixed, but no award had been made within the fixed time, and

*Held*, that as the partners by these pleadings placed themselves upon an issue, as to whether the arbitrators had fixed a time or not, and as that issue was found in favour of the plaintiff, the sum of \$400 offered had not become the compensation to be paid and a reference back was ordered.

*Cassels, Q.C., and Skinner, for plaintiff.*

*Bell, Q.C., and Biggar, for defendants.*

Boyd, C.]

[Dec. 8, 1885.]

ELIZABETHTOWN V. BROCKVILLE.

*Public Health Act, 1882—Small-pox hospital—Ad-  
joining municipalities—45 Vict. c. 29.*

*Held*, on motion for interim injunction, that under 45 Vict. c. 29 s. 12 no hospital can be placed by one municipality within the limits of another municipality, without first obtaining the consent of the latter to that step, and an injunction must go restraining the defendants from using a certain building rented by them within the plaintiffs' municipality as a small-pox hospital.

*H. J. Scott, Q.C., for the plaintiffs.*

*C. Moss, Q.C., and Reynolds, for the defendants.*

## PRACTICE.

Rose, J.]

[July 8, 1885.]

Q. B. Div.]

[December 2.]

COCHRANE MANUFACTURING CO. V. LAMON.

*Capias—Judgment—Special bail—Appearance—  
Statement of claim.*

The plaintiffs issued a writ of *capias* irregular and contradictory in its provisions. It purported to be issued in a pending action in which judgment had been recovered, and claimed the amount of the judgment and further costs. It required the defendant to put in special bail, which by its recognition meant an undertaking by sureties to pay the condemnation money in which the defendant "shall be condemned in this action." The claim endorsed upon the writ and the requirement as to special bail were alone applicable to a pending action on the judgment. The bail to the sheriff undertook that special bail would be put in, and special bail was put in.

*Held*, that the defendant and his sureties had, by putting in special bail, treated the writ as one

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

issued in an action on the judgment, and had placed the defendant in the same position as if he had appeared in such action, and a statement of claim delivered after appearance was therefore regular.

*Seable*, sec. 34 of the C. L. P. Act has not been repealed by Rule 5, O. J. A.

*Aylesworth*, for the plaintiffs.

*Shepley*, for the defendant.

Mr. Dalton, Q.C.]

[Nov. 17, 21, 1885.

Boyd, C.]

[Dec. 2.

Rose, J.]

[Dec. 5.

CONNIE ET AL. V. CANADIAN PACIFIC  
R. W. CO.

CANADIAN PACIFIC R. W. CO. V. CONNIE  
ET AL.

*Jury notice—Cause of action—Cancellation of Certificates—Injunction—Reference—Complicated questions—Burden of proof—Vexatious action—Cross action—Counter-claim—Staying proceedings.*

C. and M. were contractors for building the Canadian Pacific Railway, and sued the company for \$200,000, the balance alleged to be due upon their contract, the writ in their action having issued on the 5th October, 1885, in the Queen's Bench Division. On the 31st October, 1885, the Railway Company began an action in the Chancery Division against C. and M. to recover \$600,000, alleged to have been overpaid them, setting up that the measurements and progress certificates on which the payments were made had been obtained by fraud, and seeking the cancellation of these certificates, and an injunction to restrain the contractors from receiving a final certificate. The company did not counter-claim in the action brought by C. and M.

*Held*, that the action of the company was one which would have been begun as of course by a bill filed in Chancery, when that was a distinct Court, although it might have been possible to recover in a common law forum, if the action had been otherwise framed; it was also a case in which it was to be expected that a reference to take the accounts would be directed at some stage, and that difficult and complicated questions of law and fact would arise at the trial, which could be much better dealt with by a Judge than a jury; and the jury notice given by C. and M. was therefore struck out.

*Held*, also, that, as there was a large burden of proof upon the company, and no vexation or impropriety in their seeking to unravel the alleged fraudulent transactions, and as they were not advancing a counter-claim in the action brought by C. and M., the company's action should not be stayed till the final determination of the other action; but that the trial of the company's action was the proper preliminary step in endeavouring to adjust the rights of the parties, and should take place first.

*Taylor v. Bradford*, 9 P. R. 350, distinguished.

*McCarthy*, Q.C., *Osler*, Q.C., and *Wallace Nesbitt* for C. and M.

*Robinson*, Q.C., *Moss*, Q.C., and *R. M. Wells*, for the company.

An appeal to the Court of Appeal is pending.

C. P. Div.]

[January 2.

CONNIE ET AL. V. CANADIAN PACIFIC RY.  
CO. (No. 2).

*Causes of action—Separation—Consolidation.*

The plaintiffs in their first action claimed from the defendants a sum of \$200,000 as the balance due upon a construction contract, and in this action, begun more than a month after the first, they claimed from the same defendants a sum of \$3,000, the amount of a store account for goods sold and delivered. The cause of action arose before the commencement of the previous action.

*Held*, that the two claims should have been made in the one action, and that it was a proper exercise of discretion to consolidate this with the former action, so that the two might be tried together, and the same defences be made available in both.

*Osler*, Q.C., for the plaintiff.

*Moss*, Q.C., for the defendant.

Queen's Bench Division.]

[November 24.

DUNCAN V. TEES.

*Interpleader—Jus tertii—Execution creditor as plaintiff.*

*Held* (varying the order of *Rose*, J., 11 P. R. 66), that the execution creditor was entitled to set up against the claimants the right of the assignee, and an issue was directed, the execution creditors to be plaintiffs.

Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

*Aylesworth*, for the sheriff.*Akers*, for the execution creditors.*Shepley*, for the claimants.

Proudfoot, J.]

[Dec. 1, 1885.]

**McELHERAN V. LONDON MASONIC MUTUAL BENEFIT ASSOCIATION.**

*Adverse claims—Right to interplead—Summary application—Chancery practice—Sec. 17, sub-sec. 6, and Rule 2, O. J. A.—Payment into Court—Costs—Indemnity—Staying action.*

The plaintiff and J. P. both claimed from the defendants payment of the moneys due under a certain certificate of membership issued by the defendants to T. P., deceased, the plaintiff claiming as administrator of T. P., and J. P. claiming that the certificate had been endorsed to her by the deceased. It appeared that a duplicate certificate had issued to T. P. upon his alleging that he had lost the one originally issued. The defendants were always willing to pay to any one who might be entitled, and upon this action being brought applied for an interpleader order in respect of the adverse claims. J. P. did not appear in answer to the application, and her claim was barred.

*Held*, that there was a right to interpleader upon a summary application either under sec. 17, sub-sec. 6, O. J. A., or under the former practice of the Court of Chancery. Rule 2, O. J. A., does not extinguish any right to interplead that formerly existed; it regulates the practice only, and enables a defendant to obtain relief upon summary application, where formerly it would have been necessary to file a bill.

*Held*, also, that the defendants were entitled to their costs of the action and application, and to retain them out of the funds in their hands, and that the balance should be paid to the plaintiff instead of into Court, as the other claimant had withdrawn upon the plaintiff indemnifying the defendants against the production of the original certificate, and that the action should be stayed.

*Shepley*, for the plaintiff.*A. H. Marsh*, for the defendants.

Chan. Div.]

[Dec. 3, 1885.]

**SMITH ET AL. V. GREEY ET AL.**

*Patent suit—Particulars—35 Vict. ch. 26 sec. 24 (D.).*

In an action for an infringement of a patent the defendants denied (4) the novelty of the invention, and (6) that the plaintiff was the first and true inventor.

PROUDFOOT, J., ordered the defendants to deliver particulars under these defences, stating in what respects the defendants deny that the plaintiff's patent was for any new machine, etc., and the dates and occasions when, and the places where, the prior user of the said invention, or any material part thereof, took place, and the names of the persons by whom the prior user was had.

On appeal from this order the Divisional Court (BOYD, C., FERGUSON, J.) was divided in opinion, and the order was therefore affirmed.

*Per* BOYD, C.—In the absence of any legislation or rules of Court upon the subject, the judge has no power or right to prescribe so minutely what shall be disclosed in the particulars. There has been no change in the practice at law since *Mills v. Scott*, 5 U. C. R. 360, and there is no settled practice in equity, where it is quite a recent innovation to apply for particulars. The statute, 35 Vict. ch. 26 s. 24 (D), goes no further than to justify such general order for particulars as is usual in other cases.

*Per* FERGUSON, J.—The decision in *Mills v. Scott* was while 7 Geo. IV. ch. 5 was in force, which did not contain any provisions regarding particulars, and the orders in that case were made under the general practice of the Court; but 35 Vict. ch. 26 sec. 24 (D.) gives general power to make such order as may seem fit respecting the proceedings in the action; the delivery of particulars is a proceeding, and there was therefore jurisdiction to make the order. The order was a reasonable one, and not too comprehensive in its terms, and should therefore be affirmed.

*F. R. Powell*, for the appeal.*Mervyn MacKenzie*, contra.

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

O'Connor, J.]

[Dec. 18, 1885.]

McLEAN V. HAMILTON STREET R. W. CO.

*Excluding counter-claim—Causes of action—Trial—Negligence—Libel.*

*Held*, that it would be extremely inconvenient and inexpedient to try in one suit two causes of action in tort, each of which depends on nice distinctions of law and fact, and in one of which the Judge controls the law and the jury the facts, while in the other the jury are judges of both the law and the fact; and a counter-claim for libel in an action for negligence was therefore excluded.

*Aylesworth*, for the plaintiff.

*E. E. Kiltson*, for the defendants.

C. P. Div.]

[Dec. 19, 1885.]

CANADIAN PACIFIC R. W. CO. V. GRANT.

*Claim and counter-claim—Cross judgments—Set-off—Solicitors' lien.*

The plaintiffs sued for freight for the carriage of timber, and the defendant pleaded a counter-claim for neglect and delay in the carriage of the timber.

The judgment at the trial was as follows:—"The verdict will be for the plaintiffs for \$2,122, and for the defendants upon their counter-claim for \$1,420; and each party will be entitled to costs against the other, as if the statement of claim and counter-claim were separate actions; and I direct that judgment be entered accordingly."

*Held* (reversing the decision of the Master in Chambers), that the judgments recovered by the plaintiff and defendant must be treated as judgments in separate actions; and therefore that, in setting off the judgments, the lien of the defendant's solicitors upon the judgment against the plaintiffs for costs should be protected.

*Watson*, for the plaintiffs.

*Wallace Nesbitt*, for the defendant.

Boyd, C.]

[Dec. 21, 1885.]

PEEL V. PEEL.

*Scale of costs—Surrogate Court—Case transferred to High Court.*

In the case of an action transferred from a Surrogate Court to the High Court of Justice, the costs of the proceedings in the Surrogate Court previous to the transfer should be taxed on the scale provided by the Rules of 1858, *i.e.*, as nearly as possible on the County Court scale.

*Re Harris*, 24 Gr. 459, and *Re Osler*, 24 Gr. 529, explained and followed.

*Hoyles*, for the plaintiff.

*R. M. Meredith*, for the defendant.

Rose, J.]

[Dec. 22, 1885.]

McNABB V. OPPENHEIMER.

*Rescinding order for ca. sa.—Jurisdiction of Judge who made the order—Discharging defendant.*

A Judge in Chambers has no power to rescind his own order for a writ of *ca. sa.*, or to discharge the defendant from custody, after the order has been acted upon.

*Masten*, for plaintiff.

*T. C. Milligan*, for defendant.

Boyd, C.]

[Dec. 23, 1885.]

RE ENGLISH.

*Settled Estates Act—Separate examination of married women—M. W. P. Act, 1884 (O.)*

In a petition under the Settled Estates Act the separate examination required by the Act of a married woman living out of the jurisdiction was dispensed with in order to avoid delay and save expense; but the examination of married women within the jurisdiction was not dispensed with, where no special circumstances existed.

The Married Women's Property Act, 1884 (O.), does not apply to cases under the Settled Estates Act, where the woman had acquired the property before that Act (the M. W. P. A.)

*William Roaf*, for the petitioner.

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

Boyd, C.]

[Dec. 23, 1885.]

**BOULTON V. BLAKE.**

*Extraordinary discovery—Rule 285, O. J. A.—Discretion of Court—Information for purpose of pleading.*

The right of extraordinary discovery must be jealously guarded lest it be abused, and it should, under Rule 285, O. J. A., be conceded only when it is clearly proved to be necessary for the furtherance of justice. An application to examine under Rule 285 is in the discretion of the Court, and that discretion could not be said to have been wrongly exercised in allowing the defendant to examine the plaintiff and three witnesses before delivering the defence, in order to obtain for the purpose of pleading a knowledge of material facts, which the defendant could not otherwise get.

*Walter Barwick*, for the plaintiff.

*Small*, for the defendant.

Boyd, C.]

[Dec. 23, 1885.]

**SCHRAGG V. SCHRAGG.**

*Solicitor—Costs—Payment—Retaining moneys—Stipulation—Delivery of bill.*

Solicitors retained out of moneys in their hands belonging to their client sufficient to pay their costs of the action, and handed the client a cheque for the balance. The client accepted the cheque, but did not cash it till she had written to the solicitors, stipulating that the cashing should be without prejudice to her right to recover a larger sum if she could shew that a larger sum was due. After the lapse of a year from this transaction the client applied for an order for the delivery of a bill of costs.

*Held*, that the circumstances did not constitute payment of the costs, and the order for delivery was made.

*Re Sutton*, 11 Q. B. D. 377, distinguished.

*Holman*, for the solicitors.

*Aylesworth*, for the client.

Boyd, C.]

[Dec. 23, 1885.]

**STANDARD INSURANCE CO. V. HUGHES.**

*Interpleader—Claimants—Attaching creditors—Appeal.*

*Held*, following *Leech v. Williamson*, 10 P. R. 226, that attaching creditors are such claimants as are embraced within the provisions of the Interpleader Act, and a sheriff is entitled to apply under the Act for relief in respect of a claim made by such creditors upon moneys in his hands, the proceeds of a sale under execution.

Although *Macfie v. Pearson*, 8 O. R. 745, in effect decides that the execution creditor who has seized before process against the defendant as an absconding debtor has issued is to be paid in priority, yet that decision, having been rendered by consent in a summary way, is not binding upon the claimants, who may choose to litigate upon issues which can be carried to appeal.

*Holman*, for the sheriff.

*Aylesworth* and *Seton Gordon*, for the attaching creditors.

*Masten*, for the execution creditors.

*W. H. P. Clement*, for certificated creditors.

Mr. Dalton.]

[Dec. 28, 1885.]

Boyd, C.]

[Jan. 13, 1886.]

**SMITH ET AL V. GREEY ET AL.**

*Foreign commission—Evidence—Restricting—Solicitors' use of knowledge.*

*Held*, that the Court in allowing a foreign commission to be opened before the trial could not impose upon the parties restrictions as to the use to be made of the knowledge of the evidence which would then be acquired by the solicitors.

*Arnoldi*, for the plaintiffs.

*H. D. Gamble*, for the defendants.

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

C. P. Div.]

[January 2.]

THE SARNIA AGRICULTURAL, ETC., CO. V.  
PERDUE.

*Changing venue—Judge in Chambers—Judge at assizes—Divisional Court—Convenience—Costs.*

Mr. Winchester, sitting for the Master in Chambers, refused an application by the defendant to change the place of trial from Sarnia to Stratford, but gave leave to bring on an appeal from his order, or a substantive motion to change the place of trial before ARMOUR, J., at the Sarnia Assizes.

ARMOUR, J., entertained the motion, which was made according to the leave given, and made the order changing the venue to Stratford. The order was drawn up as made by a judge at the assizes, and was signed by the local Registrar at Sarnia.

Held, that, having regard to Rule 254 O. J. A., and to the leave given and the character of the motion, the order of ARMOUR, J., was to be regarded as that of a judge, and not of the High Court, and could therefore be reviewed by the Divisional Court.

There is nothing to prevent a judge sitting at the assizes hearing a Chambers' motion, if he is disposed for the purpose to treat the Court room as his Chambers.

This is not such an application, however, as should be made at the trial, on account of the inconvenience and detriment to the public interest arising from the delay of other business appropriate to the assizes, and on account of the injustice to parties to the cause who have prepared for trial, and it is too late when the assizes have begun to consider the question of the balance of convenience; and therefore, while the Court did not see fit, under the circumstances, to restore the venue to Sarnia, they ordered that the costs of the day at Sarnia and of the several motions to change the venue, as well as of the present appeal, should be costs to the plaintiff in the cause in any event.

W. H. P. Clement, for the appeal.

Aylesworth, contra.

Boyd, C.]

[January 7.]

DAWSON V. MOFFATT.

*Stop orders—Execution creditors—Priorities—"Creditors Relief Act, 1880"—Ratable distribution of fund in Court.*

In the case of judgment or execution creditors, priority of payment out of a fund in Court, arrested by stop orders, was formerly determined by the chronological sequence, in which the orders were obtained, and that mode of determining priorities is to be accounted for in this Province, on the ground that such was the order of payment of executions at law; and equity aiding the law conformed to the legal order of administering the fund. But, as this principle of priority of and among execution creditors has been abolished by the "Creditors Relief Act of 1880," it is no longer reasonable or seemly to preserve the analogous system of priorities in awarding equitable execution, as the outcome of stop orders; and therefore, execution creditors who had lodged stop orders between the date when the "Creditors Relief Act, 1880," came into force, and the date of the order for payment out, were held entitled to share ratably in the fund.

J. H. Ferguson, Shepley, T. P. Galt, G. F. Ruttan and Howland, Arnoldi and Ryerson, for the different creditors.

Boyd, C.]

[January 7.]

CRANE V. CRAIG.

*Infants—Allowance—Past maintenance—Encroaching on principal.*

Where an allowance for past maintenance of infants is sought out of the infants' estate, it is a rule that the principal is not to be encroached upon, unless for unavoidable reasons falling little short of necessity; and the Court will not sanction a higher allowance for past expenditure than would have been awarded for maintenance if a prior application had been made therefor. Where the amount of five infants' estate was \$11,250 the master allowed their mother \$9,504 for the five years' past maintenance, but Boyd, C. on appeal, reduced the amount to \$6,600.

J. Hoskin, Q.C., for the appeal.

George Morphy, contra.



Prac.]

NOTES OF CANADIAN CASES—CORRESPONDENCE.

Boyd, C. ]

[January 11.]

## STARK V. FISHER.

*Taxation of costs—Local officer—Appeal—Rule 427,  
O. J. A.*

Appeals from taxations by local officers should, by analogy to appeals from orders, be governed by Rule 427, O. J. A., and an appeal which was not brought on within eight days from the certificate of the local officer was struck out with costs.

*Holman*, for the appeal.

*Hughes*, contra.

## RE DRURY.

Ferguson, J.]

*Larceny Act, s. 81—Sanctioning criminal proceedings  
against trustees.*

Motion *ex parte* for sanction to criminal proceedings against an executor under sec. 81 of the Larceny Act, administration proceedings being pending.

*Held*, that inasmuch as the Court had no opportunity of forming an opinion whether at the time the moneys were diverted, as complained of, the diversion was with intent to defraud, the sanction could not be given.

*Radenhurst*, for the motion.

## CORRESPONDENCE.

*To the Editor of the LAW JOURNAL:*

SIR,—In looking over some of the Law Society accounts, as published last spring, one item struck me as singular—"Knife-cleaner and carpet sweeper, \$21." My landlady tells me that a sweeper costs about \$3. This leaves \$18 for a knife-cleaner. If the Benchers keep a boarding-house, I should like to know it, and take up my quarters where there is such clear evidence of abundant grub. I should have supposed that for an occasional lunch to our overworked Benchers, a piece of board and a chunk of bath-brick, dear at 18 cents, would have sufficed to clean all the knives that could be used. Possibly, however, it may be that the knife-cleaner is rather something whereon to hone penknives, wherewith to sharpen the lead pencils of practitioners, or possibly to whittle the library tables, or more probably it is connected with some new process of "filing bills," not yet made public.

Yours,

STUDENT.

## FLOTSAM AND JETSAM.

THE decision of Mr. Commissioner Kerr that when a creditor asks his debtor to pay him by postal order, and the order is sent but goes astray in the post, there has been a good payment, seems in accordance with the cases. In *Warwick v. Noakes*, Peake, 67, it was held that if a debtor is directed by his creditor to remit money by the post, and it is lost, the creditor must bear the loss. To ask a debtor to send a postal order is, of course, to ask him to send the postal order by post. There must, on the other hand, be no negligence in the debtor carrying out the request. The letter must be plainly directed and to the right address.—*Law Journal* (London).

# Canada Law Journal.

VOL. XXII.

FEBRUARY 1, 1886.

No. 3.

## DIARY FOR FEBRUARY.

1. Mon....Hilary Sittings of Divl. Court of Q. B. and C. P.  
[Div. begin. Sir Edw. Coke born 1552.]
5. Fri.....W. H. Draper, and C. J. of C. P., 1856.
7. Sun .....5th Sunday after Epiphany.
12. Wed....Canada ceded to G. B. 1763. Union of U. & L. C.  
1841.
11. Thur...Last day for giving notice for next sitting of Div.  
[Court, Ch. Div.]
13. Sat.....Hil. Sittings of Divl. Cts. Q. B. & C. P. Div. end,  
[unless extended by Ct.]
14. Sun .....6th Sunday after Epiphany.

## TORONTO, FEBRUARY 1, 1886.

THE rumoured appointment of Mr. Gorst to the Bench in England has not been made. Our readers will therefore please strike out his name in our sheet almanac, and insert that of Sir William Grantham. Also note that the sittings of the Supreme Court of Canada begin on February 16th, May 14th and October 26th, instead of January 18th and June 7th as there stated.

WITH reference to the question whether the late decision of the Privy Council with respect to Sir John A. Macdonald's Liquor License Act in any way affects the validity of the Scott Act, we have been favoured with a printed copy of the draft of a Bill, and of an opinion or argument prepared by a well-known draftsman for, and given to a member of the Dominion Parliament at the time the Scott Act was on the tapis. The preamble to the Bill and the opinion seem to indicate the motive of Parliament in dealing with the subject, and establish its authority to deal with it. The preamble and opinion are as follows:—

*Preamble.*—Whereas the statistics of crime in Canada show clearly that the greater number of criminals become such by the intemperate use of

intoxicating liquors, for which the too great facilities afforded by taverns or places, licensed or unlicensed, where such liquors can be readily obtained, offer temptations which many cannot resist, and which it is necessary for the repression of crime and immorality to remove; and inasmuch as it has been found that they cannot be removed by any system of licensing, and the system of partial prohibition by municipal action, tried in Ontario and Quebec, can be adopted only in those Provinces, and is there found inefficient from defects which the powers of the Provincial Legislatures do not enable them to remedy; and it is necessary to make provisions on the subject which shall be common to the whole Dominion.

*Opinion.*—The power of the Dominion Parliament to interfere and the necessity of its interference are briefly set forth in the preamble. Parliament alone has power to deal with trade and crime. Drunkenness is a crime by Act of the English Parliament, passed before Canada became a British Province, and is the parent of all the more violent offences. Where there is power to punish crime there must be power to prevent it. There is morally no crime in carrying arms, or in playing a game of cards in a railway car, and yet Parliament has passed laws to prohibit either, because either may lead to crime,—and in the case of contagious diseases of animals it has given the Governor in Council power to make provisions on subjects usually entrusted to the municipal authorities (32, 33 V., c. 37), and has expressly enacted (s. 21) that the order of the Governor, relative to an infected place shall supersede any order of a local authority inconsistent with it. It has prohibited the sale of intoxicating liquors where public works are being carried on; and has the same right to prohibit or regulate the sale elsewhere, for the same purpose,—the prevention of crime. Many more instances of such legislation by our Parliament might be adduced. Indeed, the avowed purpose of criminal law is to prevent crime rather than to punish it; it is punished to prevent its occurrence.

There were some provisions in this draft Bill which might, perhaps, have been adopted with advantage, but they do not affect the point in question.

It may, we think, fairly be said that sufficient attention has not been paid to

## THE NEW RULES.

the fact that the Scott Act is virtually "An Act for the Prevention of Crime," and that this quality distinguishes it from any of the other cases, turning on the right of the Dominion or Provincial Legislatures to deal with the questions of the sale of intoxicating liquors. The argument in the opinion is on the whole sound, though its statement that drunkenness "is the parent of *all* the more violent offences," is too wide, though it is directly or indirectly of a vast number of them.

## THE NEW RULES.

ON the 4th January last a batch of new Rules was passed by the Supreme Court. For some reason or other, known only to the initiated, these new Rules are called "Orders." Probably this is due to a somewhat Chinese copying of the mode in which the English Rules of 1883 are framed. Not being among the initiated, however, we should have preferred the word "Rules," to have been continued, if only for the sake of uniformity.

The first of these new Orders or Rules, Nos. 550-581, relate to the Accountant's office, and, with some slight variations and additions, appear to be adapted in the main from the General Orders formerly in force in regard to the Accountant of the Court of Chancery. The Chancery Orders, however, which regulated the payment of money into and out of Court, for some reason not apparent to us, have not been adopted.

So far as they go, the new Rules are better adapted to the regulation of the Accountant's department than the provisions of sec. 121 of the C. L. P. Act, which, by Rule 476, was made applicable thereto. Rule 476 is not in terms rescinded; and the Accountant, therefore, is still by law required in the month of January in every year to prepare a statement of all moneys paid into and out of Court,

and a statement of the condition of the various accounts upon the 31st day of the preceding December, and transmit a copy thereof to the Provincial Secretary, and to each of the thirteen judges of the Court, verified by a declaration of its accuracy. As the number of accounts in Court probably exceed a thousand and extend through some two dozen large folio ledgers, this must prove a very simple and useful proceeding! It seems, however, a pity that while the judges were about it they did not get rid of what is a manifest absurdity, and abolish a regulation which, from the nature of the case, cannot possibly be carried out. Rule 567 provides for the appointment of one or more auditors of the books in the Accountant's office. We understand Messrs. J. H. Mason and W. Fitzgerald, the lately appointed Inspector of Insurance Companies, have been appointed auditors.

Passing to the other Rules, No. 582 provides that all judges' orders made in chambers at Toronto are in future to be signed by the Clerk in Chambers. This assimilates the practice in the different Divisions. Rule 583 provides for the entry, in the same manner as judgments, of all orders made in chambers for administration or partition, also for the entry in full of various other orders, and is an adaptation of Chancery Order 594.

Rule 584 once more restores to the Master in Chambers the power of ordering money to be paid out of Court, except upon applications under Chy. Ords. 639-640. The Rule is expressly declared, however, not to extend to any Local Master or local judge.

All applications for sale, mortgage, or lease, or other disposition of infants' estates are, under Rule 585, henceforth to be made to the Master in Chambers, and no reference is to be directed to any Local Master except by leave of a judge of the Chancery Division; and by the following

## THE NEW RULES.

Rule the Official Guardian is to have notice of all such applications. Rule 587 removes a discrepancy which existed between R. S. O. c. 40, s. 78, and Chy. Ord. 532, and provides that no infant under fourteen need hereafter be examined in support of a petition affecting his estate, unless required by a judge; the production of the infant to the officer, however, is still necessary. Rule 588 provides that the Official Guardian is to be appointed guardian *ad litem* to lunatics in all proceedings in which it is necessary to appoint a guardian *ad litem* for them.

For the further protection of infants, Rule 589 provides that when money is recovered in any action on behalf of an infant, other than for costs, it is to be paid into Court, and any executions issued to recover the same are to be endorsed by the officer issuing them with a memorandum to that effect.

By Rules 590-592 important changes are made in reference to the trial of actions. Under these Rules an action in any of the Divisions which is to be tried without a jury may be entered for trial without any order, either at the assizes or at the sittings of the Chancery Division; and any jury case in the Chancery Division is to be entered for trial at the assizes holden at the place named for trial, without any order, and without transferring the action to any other Division. These Rules will probably be found a most salutary improvement in the practice and a saving of expense.

Rules 593-594 relate to costs. All costs in which infants or lunatics are interested, or which are payable out of any estate in which they are interested, are to be revised by one of the taxing officers in Toronto. All writs of execution are hereafter to bear an indorsement by the officer issuing them of the amount to be levied for the writ or renewals, the fee for which, in the High Court, is fixed at \$6 for writ and \$4 for re-

newals, and in the County Court at \$4 for the writ and \$2.50 for renewals.

Rule 595 enables the officers of a corporation to make affidavits in suits in which the corporation is interested. This, but for this action of the learned judges of the Supreme Court, we should have thought they had already full power to do without any Rule of Court.

Rule 596 in effect introduces the old Chancery procedure of the note *pro confesso*, in cases where interlocutory or final judgment cannot be signed for default in pleading.

Rule 597 abolishes the necessity of the affidavit formerly required in the Queen's Bench and Common Pleas Divisions to ground an examination for discovery. It however, restricts the power to take the examination to special examiners. Under the C. L. P. Act, s. 159, the examination was authorized to be taken before a deputy clerk of the Crown. Under the new Rule the local registrars, deputy registrars and deputy clerks of the Crown would appear not to have any jurisdiction to act unless they also be special examiners.

Rule 598 is adopted from Chy. Ord. 266-7, and in effect assimilates the practice in all the Divisions as to obtaining oral evidence in support of motions.

The somewhat vexed question as to where reports should be filed, is set at rest by Rule 599, which provides that they are to be filed "in the office where the proceedings are carried on." Perhaps we are wrong in saying "set at rest," for the somewhat ambiguous language used in this Rule seems calculated to create even greater confusion and obscurity than has even heretofore prevailed. Formerly the doubt was whether the Chancery practice, which required all reports to be filed at the head office of the Court, was to be followed, or whether reports were to be filed in the office where the writ issued.

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The Rule in question appears to have introduced a *tertium quid*, and what its meaning is, only judicial decision can settle. A writ may issue in Toronto, and proceedings to judgment may be carried on there, but the judgment may, as is frequently the case, direct a reference to Whitby, Sarnia, or some other place where the proceedings on the reference will be carried on. Under such circumstances, where is the report to be filed? Is it to be filed in the office where the writ issued, or in the office of the Master who conducts the reference, or the office of the local registrar, deputy registrar, or deputy clerk of the Crown at the place where the reference is carried on? This would do as a poser in practice at the law students' examinations, but we fear the Examiner himself could not answer it. Before the report can be acted on by issuing execution, or payment of money out of Court thereunder, it must be duly confirmed. How is the officer, called upon to act under it, to be certified that it has been filed in the proper office? It is really a pity so simple a matter should be involved in so much unnecessary obscurity and confusion.

The old practice in the Chancery Division as to setting down causes to be heard at the weekly sittings of the Court is abrogated by Rule 600, and causes may now be set down the day before the Court sits.

Rule 601 provides that whether the cause of action does or does not survive, the death of either party between verdict and judgment shall not prevent the entry of the judgment. This Rule is taken from the English Rules of 1883, Ord. 17, r. 1; a somewhat similar provision is to be found in R. S. O. c. 50, s. 236. The latter section, however, provided that the judgment must be entered with two Terms after the verdict.

Rules 602-603 provide for there being

henceforth but one Roll of solicitors of the Supreme Court, which is to be in the custody of the Registrar of the Common Pleas Division.

Rule 604 says: "*Mutatis mutandis*, the Roll and Rolls for barristers shall be in the same form and custody as the solicitors' Roll and Rolls," and this we take leave to say, in conclusion, is a very slipshod way of framing a Rule.

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## TRINITY TERM, 49 VICT. 1885.

The following is the Resumé of the proceeding of the Benchers published by authority:—

Proceedings of Convocation on

FRIDAY, 18TH SEPTEMBER, 1885.

Convocation met.

Present — Messrs. Falconbridge, Ferguson, Foy, Fraser, Hoskin, Irving, Kerr, MacLennan, Morris, Moss, Murray, Robinson and Smith.

Mr. Irving was appointed Chairman in the absence of the Treasurer.

The minutes of last meeting were read and approved.

Mr. Moss, from the Legal Education Committee, reported on the cases of Messrs. Forin, Flint, Howard and Brooke, that under the North-West resolutions they were all entitled to be called to the Bar, and receive Certificates of Fitness.

And on the cases of William Morris and E. W. H. Blake, that they were entitled to be allowed their second intermediate examinations.

The report was received, read, adopted and ordered accordingly.

Ordered, that Mr. A. C. Gibson be allowed his first intermediate examination under the same resolutions.

On the report of the Legal Education Committee, it was ordered that Mr. A. C.

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Gibson's name be entered on the books as a Student-at-Law, in the Graduate Class, as of Easter Term, 1884, it having been omitted by mistake.

The Legal Education Committee having reported in the cases of H. H. Macrae, and A. V. Lee,

Ordered, that Mr. Macrae's second intermediate examination be allowed him as student and articulated clerk, provided he places himself under articles, and serves for nine months; and that Mr. A. V. Lee's second intermediate be allowed him as a Student-at-Law only.

In the case of Mr. A. H. Coleman,

Ordered, that he receive his Certificate of Fitness.

The Legal Education Committee presented their Special Report on the examinations and prizes in the Law School.

On the motion of Mr. Murray, it was

Ordered, that W. D. McPherson be awarded the 1st prize for the Senior Class of 1885, of \$25 in books.

Ordered, that the Secretary and Examiners be directed to enforce the rule regarding the attendance of competitors for the Law Society prizes.

Mr. Moss, on behalf of the Legal Education Committee, stated that they were not prepared to report during the present term (Trinity Term) upon the subject of the rules for the admission and call of English Barristers, and the admission of Scotch and Irish Solicitors, which had been referred to them for report.

Mr. Ferguson moved that his notice of motion upon the subject of admission of Barristers and Solicitors in special cases do stand until the second day of Michaelmas Term next.

Ordered accordingly.

Mr. Maclellan, from the Reporting Committee, presented their report which was received and read.

The report was considered and adopted, and the Committee was authorized to take action in accordance with the recommendation of the report.

Ordered, that a copy of this resolution be sent to the reporter of the Court of Appeal this day.

The petition of Norman McLeod was read and referred to the Legal Education Committee.

Ordered, that Mr. Falconbridge be placed upon the Finance Committee in

place of Mr. Morris who desires to withdraw from that Committee.

Convocation adjourned.

J. K. KERR,  
*Chairman, Committee on Journals.*

## MICHAELMAS TERM, 49 VICT., 1885.

During Michaelmas Term the following gentlemen passed the examination for Barrister-at-Law, namely:—Messrs. Edward Kirwan Cornwall Martin, William David McPherson, Josiah James Godfrey, Allan Malcolm Dymond, William Fenwick Williams Creelman, Henry Charles Fowler, Theophilus Bennett, James Smith, William Elzar Stevens, Thomas Chalmers Milligan, Edward George Grahame, William Hume Blake, Thomas Brown Lafferty, A—— W——, Aytoun Finlay, Frederick William Garvin, Patrick McCullough, Alexander Skinner.

The following gentlemen passed the Solicitors' Examination, namely:—Messrs. E. K. C. Martin, E. G. Grahame, E. F. Gunther, H. C. Fowler, A. M. Dymond, J. J. Godfrey, F. W. Hill, J. M. Duggan, F. R. Latchford, H. T. Kelly, G. G. S. Lindsay, W. H. Blake, P. McCullough, W. F. W. Creelman, C. R. Atkinson, M. E. Mitchell, A. M. Lafferty, A. G. Chisholm, D. Fasken, T. E. Griffith, J. M. Macnamara, James Smith, A. C. Macdonell, L. Harstone, A. Skinner.

The following gentlemen passed the First Intermediate Examination, namely:—Messrs. H. S. W. Livingston, with honours, first scholarship; W. Green, with honours, second scholarship; and A. Morphy, W. E. Fitzgerald, E. D. Cameron, N. F. Davidson, W. Smith, C. McIntosh, T. Scullard, W. C. Fitzgerald, R. J. Maclellan, G. F. Bradfield, A. F. Lobb, S. R. Wright, F. A. Drake, A. D. Dickson, H. N. Roberts, R. Ruddy, W. H. Stafford, T. C. Robinette, C. R. Hanning, J. S. Walker, D. R. Anderson, G. F. Cane, J. F. Wills.

The following gentlemen passed the Second Intermediate Examination, namely:—Messrs. C. J. Atkinson, with honours, first scholarship; W. A. J. Bell, with honours, second scholarship; C. E. Weekes, with honours, third scholarship. And Messrs. E. C. S. Huycke, D. O.

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Cameron, S. McKeown, A. M. Denovan, J. McKay, H. A. Percival, G. J. Leggett, R. H. J. Pennyfather, W. H. Sibley, R. A. Bayley, J. A. Macdonald, W. B. Willoughby, W. M. Sinclair, W. J. McWhinney, C. J. T. Gould, F. E. O'Flynn, J. P. Lawless, J. H. A. Beattie, W. H. Dean, S. T. Hamilton, F. F. Lemieux, T. Hislop, F. N. Raines, G. S. Willgress, E. M. Young, H. H. Dewart, G. R. O'Reilly, N. McDonald, L. H. Baldwin, J. L. Snedden, J. Vance, P. F. Young.

The following candidates were admitted as Students-at-Law, namely:—

*Graduates.*—Andrew Allison Adams, Arthur Collins, John. Wakeman Evans, Malcolm Smith Mercer, Henry Warrington Church.

*Matriculants.*—Edward Samuel Blake Cronyn, Walter Mills, James Francis Turnbull, W. Cameron Smith.

*Juniors.*—John Fosbery Orde, Donald Grant, Stewart Charles McDonald, John Alexander McIntosh, James Fraser Macdonald, R. G. Widdowson, Arthur Clayton Sutton, Charles R. Ball, William Loughton Morton, Ernest William McIntyre, Thomas Walter Horn, John James O'Meara, John Franklin Hare, Henry Woode Macomb, James Francis O'Brien, John Reeve, Henry Albert Simpson, Harold Jamieson, Freeman Harding, Herbert Wilkes Stewart.

*Articled Clerks.*—Frederick McMahon and Arthur Lincoln Decker.

MONDAY, 16TH NOVEMBER, 1885.

Convocation met.

Present—Messrs. Beaty, Cameron, Falconbridge, Ferguson, Foy, Irving, Kerr, MacLennan, Martin, Morris, Murray, McMichael, Osler.

Mr. Irving was appointed Chairman in the absence of the Treasurer.

The minutes of the last meeting were read, approved and signed by the Chairman.

Mr. Ferguson, from the Legal Education Committee, reported on the petitions of Messrs. Boyd, Helliwell and Dignan under the North-West resolutions, recommending that Mr. Boyd be allowed his first intermediate examination and Messrs. Helliwell and Dignan their second intermediate examinations.

The report was received, read, considered, adopted and ordered accordingly.

Mr. Ferguson also reported on the case of A. M. Taylor, recommending that his petition be not granted, he not having been on the books of the society for five years as a student.

The report was adopted.

Mr. Ferguson also reported on the case of J. A. Fleming, who employed one Owen, a high school teacher and English university graduate, to personate him at his primary examination, recommending that the matter be referred to the Discipline Committee.

The report was received, read, adopted and referred to the Discipline Committee with all papers connected with the case.

Mr. Murray, from the Finance Committee, reported on the sanitary condition of the building.

The report was read, received and ordered for immediate consideration.

The report of the Finance Committee on sanitary matters was adopted.

The petitions of Messrs. Latchford, Fowler, Gunther and Harstone were referred to the Legal Education Committee for consideration and report.

The letter of P. H. Allen was read in reference to a return of a portion of his Primary fee.

Ordered, that the Secretary reply that no return can be made.

Mr. Ferguson, from the Legal Education Committee, reported that A. C. Macdonell had completed his service and was entitled to a Certificate of Fitness.

The report was adopted, and ordered that he receive his Certificate of Fitness.

The secretary reported that H. C. Fowler had completed his papers and was entitled to be called to the Bar.

Ordered accordingly.

Mr. Osler gave notice of motion for 17th inst:—"That it is expedient to form a branch library at the Court House in the City of Toronto, to consist of a complete set of the statutes, a complete set of the Upper Canada and Ontario Reports, and the English Reports, beginning with the Law Reports series, with a selection of text books in common use at *nisi prius*, and that the City Council be requested to provide accommodation in the New Court House for such library."

Mr. Murray gave notice for 17th inst:—"That he will move that the use of the Examination Hall be granted to the

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Osgoode Legal and Literary Society for their weekly meeting, subject to such rules as may be laid down by and under the direction of the Finance Committee."

Mr. Morris gave notice that he would move for the appointment of a committee to report to Convocation upon a system whereby Benchers living a certain distance from Toronto be paid their travelling expenses in attending Toronto during Convocation.

Convocation adjourned.

TUESDAY, 17TH NOVEMBER, 1885.

Convocation met.

Present — Messrs. Cameron, Falconbridge, Ferguson, Foy, Hardy, Hoskin, Irving, Kerr, Martin, Morris, Moss, Murray, McCarthy, Pardee.

Mr. Irving was appointed Chairman in the absence of the Treasurer.

The minutes of the last meeting were read and confirmed.

On the report of the Examiner and his explanation of the facts connected with the examination passed by Mr. Widdowson before him for admission to the Law Society as a Student-at-Law it is ordered that the examination be allowed to Mr. Widdowson in the junior class in the rank in which he stands in the Examiner's Report.

The Examiners having reported that Mr. P. McCulloch had passed his oral examination for call to the Bar, and that such examination had been held in accordance with the order of Convocation of 16th inst., and the Secretary having reported also upon the regularity of his call papers.

Ordered, that Mr. McCulloch be called to the Bar.

The petitions of Messrs. Gunther and Fowler were referred to the Finance Committee for report. Mr. Falconbridge presented the petition of Mr. Cæsar Grace, which was referred to the Legal Education Committee.

On the motion of Mr. Murray, seconded by Mr. Martin, it was ordered, "that the use of the Examination Hall be granted to the Osgoode Legal and Literary Society for their weekly meetings, subject to such rules as may be laid down by and under the direction of the Finance Committee."

Mr. Osler moved, pursuant to notice, "That it is expedient to form a branch library at the Court House in the City of

Toronto, to consist of a complete set of the statutes, a complete set of the Upper Canada and Ontario Reports and the English Reports, beginning with the Law Reports series, with a selection of Text Books in common use at *nisi prius*, and that the City Council be requested to provide accommodation in the New Court House for such library."

Ordered, that the matter be referred to the County Libraries' Aid Committee for consideration and report, and that Mr. Osler be added to the said Committee in respect of the matter of his notice.

Mr. Hoskin presented the report of the Discipline Committee on the case of J. A. Fleming; the report was adopted, and the matter referred to the Discipline Committee to deal with in accordance with the powers in the statute contained.

Convocation adjourned.

SATURDAY, 21ST NOVEMBER, 1885.

Convocation met.

Present—Messrs. Blake (S. H.), Cameron, Falconbridge, Ferguson, Foy, Hudspeth, Irving, Mackelcan, MacLennan, Morris, Moss, Murray, McMichael, Osler and Smith.

Mr. Irving was appointed Chairman in the absence of the Treasurer.

The minutes of the last meeting were read and approved.

Mr. Moss, from Legal Education Committee, reported on the cases of Messrs. Fowler, Hill, Latchford, Harstone and Grace.

The report was received, read and adopted.

Ordered, that certificate of H. C. Fowler be granted on completion of service; that certificate of F. W. Hill be granted; that certificate of F. R. Latchford be granted on proof of completion of forty-two days service; that Leonard Harstone do receive his Certificate of Fitness without further examination on proof of his service for one year from Oct. 1st., 1884.

Ordered, that the petition of J. C. Grace be not granted.

The Secretary reported that Messrs. Gunther, Godfrey and J. Smith had completed their service, and papers proving it, and were entitled to their Certificates of Fitness.

Ordered, that certificates be granted to Messrs. Gunther, Godfrey and Jas. Smith.



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Mr. Murray, from the Finance Committee, presented the report of that Committee and Mr. Storm's report (the architect) on the condition of the ceiling in the library, which was received and read.

Ordered, that the Committee renew their representations to the Government by waiting on them, and meantime that they will take such steps as will ensure the safety of those using the library.

Mr. Moss, from the Legal Education Committee, presented their report in reference to the call of Barristers and admission of Solicitors as special cases, which was received and read.

Ordered, that the report and draft rules be printed and distributed to members of Convocation, and that the report be ordered for consideration on Saturday, 5th December inst.

Mr. Hector's petition was read.

Dr. McMichael moved that the prayer of the petition be granted.

On reference to page 135 of Vol. vii. of the Journals, where the former action of Convocation in the case is recorded, it was ordered that the petition be referred to a special committee, consisting of Messrs. MacLennan, S. H. Blake and D. McMichael, to investigate the facts, and give the reasons arrived at with respect thereto, in order that Convocation may finally settle the subject-matter of the petition.

The report of the Finance Committee on the petitions of Messrs. Fowler and Gunther, asking for the return of their fees under the North-West resolutions, recommending that the prayers of the petitions be not granted, was received, read and adopted.

Ordered, that the prayers of the petitions be not granted.

The petition of A. Skinner was received and read.

Ordered, that the prayer of the petition be granted to the extent of dispensing with his examination both as Barrister and Solicitor, but no further.

Convocation adjourned.

FRIDAY, 27TH NOVEMBER, 1885.

Convocation met.

Present—Messrs. Britton, Falconbridge, Foy, Irving, Martin, Morris and Murray.

Mr. Irving was appointed Chairman in the absence of the Treasurer.

The minutes of the last meeting were read and confirmed.

The Secretary reported that Messrs. Fowler, McCullough, Chisholm and Skinner had now served their full time, and were entitled to receive their Certificates of Fitness, also that Mr. Alex. Skinner had filed his call papers, and was entitled to be called to the Bar.

Ordered, that Messrs. Fowler, McCullough, Chisholm and Skinner receive Certificates of Fitness, and that Mr. Skinner be called to the Bar.

Mr. Murray, on behalf of the Finance Committee, presented their report on the Library ceiling, which report was read, received and adopted.

Mr. Murray, on behalf of the Reporting Committee, presented their report, which was received and read.

The report was adopted.

Mr. Murray, in connection with the above report, presented the letters of the Editor-in-Chief and Mr. E. B. Brown, which were read.

The petition of Mr. Alan Cassels, *re* W. H. Sibley, was read and referred to the Discipline Committee for report to Convocation.

The petition of Mr. F. S. O'Connor, praying that he might be excused from advertising a second period in the *Ontario Gazette* his notice of intention to present himself for call, was received, read and the prayer of the petition granted.

Mr. Martin drew attention to the manner in which the Examiners furnished the Benchers in Convocation with printed examination questions.

Ordered, that the Secretary direct the examiners to furnish him with one complete set of the examination questions, properly assorted and fastened together, of each examination held by them; and that such complete set be delivered to him immediately after the several examinations are concluded; and that he direct the examiners further to supply him with twenty-four sets of the examination papers, not assorted.

Mr. Britton moved that the Finance Committee be directed to apply for leave to put up a telephone in the room adjacent to the Common Pleas Divisional Court, such telephone to be limited to the despatch of messages by Barristers and Solicitors only, or to report if any other suit-

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able place for a telephone upstairs can be procured.

The Secretary drew attention to No. 6 of the standing orders of Convocation, page 47 of the Rules.

Ordered, that the consideration of the subject be deferred until the return of the Treasurer.

Mr. Murray gave notice that he would move a rule at the next meeting of Convocation dealing with the resolution of Convocation of 23rd May last, relating to the salary of the second assistant in the Library.

Convocation adjourned.

SATURDAY, 5TH DEC., 1885.

Convocation met.

Present—Messrs. Blake (S. H.), Cameron, Falconbridge, Ferguson, Foy, Hoskin, Kerr, Mackelcan, MacLennan, Martin, Morris, Moss, Murray, McMichael, Osler, Robinson, Smith.

In the absence of the Treasurer Dr. L. W. Smith was appointed Chairman.

The minutes of last meeting were read and approved.

The report of the Discipline Committee on the case of James A. Fleming was received, read, ordered for immediate consideration and adopted.

Ordered, that the name of James A. Fleming be erased from the roll of law students and from the report of the Legal Education Committee on the Primary Examination for Easter Term, 1885, and from the minutes of Convocation of that Term; and that the sum of fifty dollars paid by him to the Law Society be returned to him, and that he be notified of the action of Convocation by the Secretary.

The Chairman thereupon erased the name of James A. Fleming from the roll of law students, from the report of the Legal Education Committee on the Primary Examination of Easter Term, 1885, and from the minutes of Convocation of that Term.

The report of the Discipline Committee on the case of W. H. Sibley was received.

After some discussion Mr. Alan Cassels was called in to ascertain if he was prepared to prosecute Mr. Sibley for the acts complained of before his case is considered by Convocation. Mr. Cassels expressed his willingness to prosecute.

Ordered, that the report of the Discipline Committee in the case of W. H. Sibley be not now considered; but that the consideration of the complaint against him be deferred until it shall appear whether or not action is to be taken to prosecute him criminally.

The report of the special Committee on the petition of Mr. John Hector, Q.C., was read by Mr. Blake, whereupon it was moved by Mr. Hector Cameron, seconded by Dr. McMichael, that the sum of \$350, being the amount of actual disbursements claimed in Mr. Hector's petition to have been made by him, be allowed to him.

It was moved in amendment by Mr. MacLennan, seconded by Mr. Mackelcan, and carried, that the prayer of Mr. Hector's petition be not granted.

The report of the Finance Committee on the subject of placing another telephone in the Common Pleas barristers' room was read by Mr. Murray.

Ordered, that the report be received, but that no action be taken thereupon.

The petition of Arthur Lincoln Decker was read.

Ordered, that Mr. Decker's petition be granted, and that he be admitted as an articulated clerk as of the present term.

Mr. Murray moved, pursuant to notice, that Rule 119, sub-section 2, be amended by striking out the word "four" in the third line and substituting therefor the word "five," and that said amendment date back and take effect from the first day of Easter Term, 1885. Carried.

This rule was read first, second and third time, by unanimous consent, and passed.

#### RULES FOR THE CALL OF BARRISTERS IN SPECIAL CASES UNDER REVISED STATUTES, ONT. CH. 138, SEC. 38.

On the motion of Mr. Charles Moss, seconded by J. H. Ferguson,

It is ordered, that Rules 94, 95, 96, 97, 98 and 99 of the Society, and the rules passed 2nd September, 1882, amending the same be, and the same are hereby repealed, and the following rules substituted therefor, namely:—

94. The following persons may, as special cases, be called to practise at the Bar:

(1.) Any person who has been duly admitted and enrolled, and has been in actual practice as a Solicitor of the Supreme Court of Ontario, or an Attorney or Solicitor in the Superior Courts of any

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of the other Provinces of the Dominion in which the same privilege is extended to Solicitors of the Supreme Court of Ontario.

(2.) Any person who has been duly called to the Bar of England, Scotland, or Ireland (excluding the Bar of merely local jurisdiction), when the Inn of Court, or other authority having power to call or admit to the Bar by which such person was called or admitted, extends the same privilege to Barristers from Ontario, on producing sufficient evidence of such call or admission, and testimonials of good character and conduct to the satisfaction of the Law Society.

(3.) Any person who has been duly called to the Bar of the Superior Courts of any of the other Provinces of the Dominion in which the same privilege is extended to Barristers of Ontario.

95. Every such person, before being called to the Bar, shall furnish proof,

(1.) That notice of his intention to apply for call to the Bar was given during the term next preceding that in which he presents himself for call and was also published for at least two months preceding such last mentioned term in the *Ontario Gazette*.

(2.) That he was duly admitted and enrolled and has been in actual practice as an Attorney or Solicitor as mentioned in sub-section 1 of Rule 94 and that he still remains duly enrolled as such and in good standing and that since his admission as aforesaid no adverse application has been made to any Court or Courts to strike him off the roll of any Court or otherwise to disqualify him from practice as such Attorney or Solicitor, and that no charge is pending against him for professional or other misconduct.

(3.) Or that he was duly called to and is still a member in good standing of the Bar, as mentioned in sub-sections 2 and 3 of Rule 94, and that since his call no adverse application has been made to disbar or otherwise disqualify him from practice at the Bar of which he claims to be a member, and that no charge is pending against him for professional or other misconduct.

(4.) That he has passed one or more examinations as hereinafter prescribed,

(a.) An Attorney or Solicitor of at least five years' standing on the Rolls of any of the Courts mentioned in the said sub-section 1 of Rule 94 shall be examined with the ordinary candidates for call in the subjects prescribed for the final examinations of Students-at-Law.

(b.) An Attorney or Solicitor under five years' standing on the roll of any of the Courts mentioned in the said sub-section 1 of Rule 94 shall be examined with candidates for admission in the subjects prescribed for the primary examination of Students-at-Law, and with the ordinary candidates for call in the subjects prescribed for the final examination of Students-at-Law, and such examinations may be passed at the one term or otherwise, as the candidates may desire.

(c.) A Barrister as mentioned in sub-sections 2 and 3 of Rule 94 shall pass such examination as may be prescribed at the time of his application for call.

96. The fees payable by such candidates for call to the Bar in addition to the ordinary fees payable for admission, and for call, shall be the sum of two hundred dollars.

# RULES FOR THE ADMISSION OF SOLICITORS IN SPECIAL CASES, UNDER REVISED STATUTES, ONTARIO, CHAPTER 138, SECTION 41.

97. The following persons may, as special cases, be admitted and enrolled as Solicitors of the Supreme Court of Ontario.

1. Any person who has been duly called to practise at the Bar of Ontario, or in any of the Superior Courts not having merely local jurisdiction, in England, Ireland, or Scotland, or in the Superior Courts in any of the other Provinces of the Dominion.

2. Any person who has been duly admitted and enrolled as a solicitor of the Supreme Court of Judicature in England, or as an Attorney and Solicitor in the Courts of Chancery, Queen's Bench, Common Pleas, or Exchequer in Ireland, or as a Writer to the Signet, or Solicitor in the Superior Courts of Scotland, or as an Attorney or Solicitor of any of Her Majesty's Superior Courts of Law or Equity in any of Her Majesty's Colonies wherein the Common Law of England is the Common Law of the land.

98. Every such person before being admitted to practise as a Solicitor, shall after complying with provisions of Revised Statutes of Ontario, chapter 140, section 7, furnish proof:

1. A Barrister as mentioned in sub-section 1 of Rule 97 that he was bound by a contract in writing to a practising Solicitor in Ontario to serve, and has served him as his articulated clerk for the period of three years.

2. An Attorney, Solicitor, or Writer (as mentioned in sub-section 2 of rule 97) that he was bound by a contract in writing to a practising Solicitor in Ontario to serve, and has served him as his articulated clerk for the period of one year.

3. That he has passed the usual examination in the subjects prescribed for the examination of candidates for Certificate of Fitness to practise as Solicitors of the Supreme Court of Ontario.

4. That notice of his intention to apply for admission as such Solicitor was given during the term next preceding that in which he presents himself for examination and admission, and was also published for at least two months preceding such last-mentioned term in the *Ontario Gazette*.

99. The fees payable by such candidates for admission to practice, in addition to the ordinary fees for articulated clerks, and for admission, shall be the sum of two hundred dollars.

The rules were read a first time.

The rules were read a second time.

Third reading to take place on Tuesday, 29th December.

Convocation adjourned.

J. K. KERR,

Chairman, Committee on Journals.

Ct. Ap.]

NOTES OF CANADIAN CASES.

[Q. B. Div.]

## NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

## COURT OF APPEAL.

Q. B. D.] [January 12.]

SCOTT V. BENEDICT.

*Vendor's lien.*The judgment of the Court below, 5 Ont. R.  
1; 20 C. L. J., 106, was affirmed.

The appellant in person.

*W. Barwick*, for the respondents, Benedicts.

The Chancellor.]

TRAVIS V. TRAVIS.

*Donatio mortis causa—Gift inter vivos.*The judgment of the Court below, 8 Ont. R.  
516; 21 C. L. J., 197, was affirmed.*McClive*, for the appellant.*Muir*, for the respondent.

Q. B. D.]

BLEAKLEY V. TOWN OF PRESCOTT.

*Municipal corporation—Badly constructed side-  
walk—Ice on sidewalk.*The judgment of the Court below, 7 Ont. R.  
261; 22 C. L. J., 55, was reversed.*Watson*, for the appellants.*Read*, Q.C., and *Walter Read*, for the re-  
spondent.

## QUEEN'S BENCH.

KLOEPFER V. GARDINER.

*Assignment f. b. o. c.—Repudiation by creditor—  
Rights.*

In an action by a creditor of an insolvent against the assignee under an assignment for the benefit of creditors to recover the amount of the dividend declared upon his claim, the defendant pleaded as a defence that the plaintiff, disputing the validity of said assignment, had as an execution creditor of the insolvent caused the goods assigned to be seized, and, on the trial of an interpleader issue directed, had endeavoured to impeach the said assignment; and that having thus repudiated the assignment he could not now claim the benefit of it.

*Held* (O'CONNOR, J., dissenting), a good defence, and that the plaintiffs were not entitled to recover.

It was contended for the plaintiffs that the said action not having been tried upon the merits, but that the Court having held that the plaintiffs being assenting parties to the assignment were estopped from afterwards impeaching it, formed no bar to the plaintiff's right to rank as a creditor upon the estate of the insolvent.

*Per* WILSON, C.J., that the mere bringing of the action was sufficient repudiation to disentitle the plaintiffs.

*Per* O'CONNOR, J., that by the judgment of the Court the plaintiffs were relegated back to their position and status under the assignment and therefore to the benefit of it.

*Creasor*, Q.C., in support of motion.*W. Nesbitt*, contra.

GARDNER V. KLOEPFER.

*Damages—Remote and speculative—New trial.*

McR. & McR., being in insolvent circumstances, made an assignment for the benefit of their creditors to the plaintiff, the defendant K., and another. The defendant K. accepted the trust and acted on it. Afterwards, being desirous of disputing the validity of the assignment, he recovered judgment against the insolvents, issued execution thereon, and seized

## Q. B. Div.]

## NOTES OF CANADIAN CASES.

## [Q. B. Div.]

certain raw material intended to be worked up into buggies. The plaintiff claimed the goods, and an interpleader issue was directed which resulted in favour of the plaintiff, the Court having held that the defendants, having once assented to the assignment, could not afterwards impeach it. The plaintiff then brought this action to recover damages for the wrongful seizure and detention of the goods. The jury found a verdict for the plaintiff, but it appeared that the damages awarded were entirely for the loss of profits which it was claimed might have been made by working up into buggies the said material, and by having the buggies ready for sale at a period much earlier than if no seizure had been made.

*Held* (WILSON, C.J., dissenting), that the damages assessed were too uncertain, speculative and remote to have been legally recoverable, but as the learned judge excluded damages from the consideration of the jury which might have been legally recovered a new trial was directed.

*Creasor*, Q.C., for plaintiff.

*W. Nesbitt*, contra.

## MILLER V. REED.

*Master and servant—Injury.*

*Held*, in an action by a servant against a master for injury received by the servant by reason of a circular saw which he was hired to run not being guarded, it is not sufficient to show that the master knew that it was not guarded; but it must also be shown that the servant was ignorant of it, and as the servant was skilled in the use of the saw and was hired to run it, it was his duty to see that it was guarded, and he would not therefore recover for what was his own neglect.

*Dickson*, Q.C., for motion.

*Burdett*, contra.

## WANAMAKER V. GREEN.

*Municipal Act, sec. 546—By-law closing road.*

*Held*, that the notices required to be given by the Municipal Act, 1883, sec. 546, are conditions precedent, the due observance of which is essential to the validity of a by-law passed for the purposes referred to in that section.

*Held*, also, that a by-law closing a "certain road across lot 15, 7th con., Sidney," where there were more than one road across that lot, was void for uncertainty.

*Sherry*, for motion.

*G. Henderson*, Q.C., contra.

## RICHARDSON V. RANSOM.

*Police magistrate—Power of appointment.*

*Held*, that a person could not be held to be a trespasser merely by laying an information charging another with a crime, and praying therein that a warrant might be issued for his arrest, before a police magistrate appointed by the Ontario Government.

*Per WILSON, C.J.*, that the power to appoint police magistrates resided with the Ontario Government.

*Burdett*, for defendant.

*Dickson*, Q.C., for plaintiff.

*Johnston*, for Attorney-General.

## ROSS V. GRAND TRUNK RY. CO.

*Railway—Expropriation money—Statute of limitations.*

*Held*, that the right of compensation for land taken by a railway is not barred short of twenty years, and is not barred by the claimant's titles to the land being extinguished by reason of the railway having been in possession for ten years.

*Meredith*, Q.C., for motion.

*Lash*, Q.C., contra.

## LANCEY V. BRAKE.

*Contract—Parol agreement to alter.*

Defendant got six different sums of money from plaintiff amounting altogether to \$3,000 for which he gave receipts. Three of the receipts stated the defendant received so much money from the plaintiff, "loan on oil, usual rate of interest." The other three were similar to the others, but they concluded "payable within one year from date with interest at nine per centum per annum."

The defendant set up parol agreement with the plaintiff, by which the defendant had the

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right at any time to require the plaintiff to take in payment of the money so lent the oil which the defendant had in the plaintiff's tanks at the market price at the time when the defendant so required the plaintiff to take the oil.

*Held*, that such a parol agreement could not be set up to alter the terms of the receipt which showed such loans were to be repaid in money, although the jury found the parol agreement to have been made. The Court, having all the facts before them, directed the verdict and judgment to be entered for the plaintiff for the full amount of his claim.

*Osler*, Q.C., for motion.

*Meredith*, Q.C., contra.

#### CHANCERY DIVISION.

Boyd, C.]

[Dec. 23, 1885.]

#### CHARTERIS V. CHARTERIS.

*Will—Construction—Trust—Discretion—Failure of trustee—Reference to Master to work out a scheme.*

A testator having disposed of one-third of the residue of his estate, real and personal, devised and bequeathed the remainder to J. C. to hold to him, his heirs, executors and administrators or assigns in trust for the benefit of the testator's two sisters, and with all reasonable expedition to convert the same into money and apply the same or the proceeds thereof for the benefit of the said two sisters, or otherwise distribute the same equally among his said two sisters as he should consider just. And he directed that his other trustees should not enquire into or interfere with such distribution as J. C. might choose to make among the said two sisters, except when their concurrence should be necessary for conformity.

J. C. predeceased the testator.

*Held*, that the above was in substance an imperative declaration of a trust of the whole for the equal benefit of the two sisters with a discretionary power reposed in the trustee as to its mode of execution, and the Court would undertake to discharge vicariously what could not otherwise be done, owing to J. C. predeceasing the testator, by referring it to the

Master to ascertain the proper mode of carrying out the directions of the will.

*Re Charteris*, 25 Gr. 376, commented on.

Order made referring it to the Master to work out a scheme for the application and distribution of the fund.

*S. H. Blake*, Q.C., for the plaintiff.

*C. R. Atkinson*, Q.C., for the curator.

*MacLennan*, Q.C., for the infant defendants.

*Clement*, for the adult defendants other than the trustees.

*Wilson*, for the trustees.

Full Court.]

[Dec. 23, 1885.]

#### HICKEY V. STOVER.

*Will—Ambiguity—Extrinsic evidence—Guardianship—Express trust—Statute of limitations.*

A testatrix devised the south quarter of lot 20, con. 9, township of Raleigh to T., and east quarter of said lot to her two daughters.

It was sought to show that the testatrix had no other land than lot 20 in con. 8, Raleigh, and to make the will operate on this.

*Held*, that the judge below was right in rejecting evidence of extrinsic facts, and that even if it might have been shown that lot 20 in con. 8 was the only lot which the testatrix owned, the will could not operate to pass it.

The devise in the will was in its terms free from all ambiguity. It was not inherently absurd or insensible, not inconsistent with any context, and there was nothing else in the will which could be brought in to aid in its interpretation. The testatrix owned one thing and devised another, and evidence was not admissible to show that these were identical, or that one meant the other for the purposes of the will, nor was evidence of the intention of the testatrix admissible to explain the will containing, as it did, no latent ambiguity. To show that the testatrix did not own lot 20 in con. 9, was no evidence of an intention by her to devise lot 20 in con. 8.

*Held*, also, that though a guardian by appointment of the Surrogate Court was an express trustee during the minority of the ward, so that she could not acquire title against him by possession of his lands, yet the guardianship ended, and the trust ceased with the ward's minority, and since after that the guardian

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dealt with the property as her own for some 20 years, she had acquired a good title by possession against her former ward.

#### RE MONTEITH.

#### MERCHANTS' BANK ET AL. V. MONTEITH.

*Administration—Warehouse receipts—Possession of the goods—Evidence—43 Vict. c. 22, s. 7 (D).*

In administration proceedings in the M. O. certain unsecured creditors of the deceased sought to make certain other creditors account for the proceeds of certain goods which they, claiming to be entitled to them under warehouse receipts, by attacking the validity of the warehouse receipts. It appeared by the evidence of H. that he had in M.'s lifetime signed warehouse receipts at the request of M. for goods warehoused in M.'s cellar, on which M. had obtained advances, although he, H., never had possession of the goods. The Master found against the evidence of H. that the warehouse receipts were valid. On an appeal from the Master, it was

*Held*, that H. had acted as a warehouse keeper in issuing the receipts, and not as a mere bailee, and that the test of the validity of the warehouse receipts did not necessarily depend upon proving that he was actually, visibly and continuously in the possession of the goods from first to last. The receipts were not void at their inception. M. having disappeared, H. took possession of the goods, and allowed the secured creditors to take and sell them, which they had a right to do. The report should therefore not be disturbed. Query, as to rights of execution creditors against M., if there had been any before H. took possession of the goods; credibility of witnesses and evidence in criminal proceedings commented upon.

Rule of the Court in the administration of assets as laid down in *Wilson v. Paul*, 8 Sim. 63, and *Mitchelson v. Piper*, *Ib.* 64, referred to.

*Per* PROUDFOOT, J., 43 Vict. c. 22, s. 7 (D), authorizes persons who are not warehousemen alone to give receipts, but such warehouse receipts are comprised in the definition previously given in the statute, which requires the goods to be in the actual, visible and continued possession of the bailee.

Ferguson, J.]

[December 14, 1885.]

#### WICKSTEED V. MUNRO.

*Insurance for benefit of child—Death of child during lifetime of insured—Right of administratrix to insurance money—R. S. O. c. 129.*

A. M. M. in 1868 insured his life for the benefit of his daughter, H. M. M., under 27 Vict. c. 17. H. M. M. married the plaintiff W. in 1879, and died during her father's lifetime in 1882, leaving a daughter for whose benefit she devised all her interest in the said policy to her husband by her will, in which she recited that she had paid the premiums which had been allowed to remain unpaid and kept the policy up for several years. A. M. M., subsequently, in 1877, married the defendant, M. A. M., and died intestate in 1884, leaving her his widow and one child by his second marriage without having made any further disposition of the insurance.

In an action by W. as executor of H. M. M. against M. A. M. as administratrix of A. M. M. to try the right to the insurance money. It was

*Held*, that the insurance money belonged to the estate of the insured, and was payable to the defendant M. A. M. as administratrix thereof.

*MacLennan*, Q.C., for the plaintiff.

*Miller*, Q.C., for the defendant.

#### COMMON PLEAS DIVISION.

Divisional Court.]

[January 2.]

#### RYAN V. CANADA SOUTHERN RY. CO.

*Railways—Accident—Contributory negligence—Withdrawing case from jury.*

On the undisputed facts disclosed in the plaintiff's case it appears that there was a switch stand erected in defendants' yard close to the track, the deceased, who was brakeman in the defendants' employment, being aware of its position and proximity to the track. On the day in question the deceased was engaged as a brakeman on a train passing through the yard. His position of brakeman was on the top of the car, but for some reason which did not appear, he was on the side of the car, holding on to a ladder, and, as his

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attention was drawn towards the end of the train, he did not see the switch stand, and was thrown under the wheels of the car and killed.

*Held*, that there was such want of care on the part of the deceased as disentitled the plaintiff, his administrator, to recover; and that the case was properly withdrawn from the jury.

*Falconbridge, Q.C.*, for the plaintiff.

*Kingsmill*, for the defendant.

### HARRIS V. WATERLOO MUTUAL INS. CO.

*Insurance—Proofs of loss—Fraudulent statement as to amount of loss.*

By a policy of insurance against fire the plaintiff effected an insurance on buildings and contents, the amount placed on contents being \$200. In the proofs of loss, to induce the defendants to pay the loss, the plaintiff falsely and fraudulently stated that he had suffered loss on the contents to the amount of \$1,665.50, whereas the contents were proved to be worth only \$150.

*Held*, that this vitiated the whole policy, and was not confined to the property as to which the false statement was made.

*Lash, Q.C.*, for the plaintiff.

*Osler, Q.C.*, and *Ward Bowlby*, for the defendants.

### PARDEE V. GLASS.

*Trespass—Seizure—Interference with—Notice of action—Goods in custody of law.*

The Bank of Montreal placed an execution against M., plaintiff's son, in the hands of B., a Division Court bailiff, under which B. seized a stallion as belonging to M. The stallion was placed with an innkeeper, pending interpleader proceedings instituted on plaintiff claiming the horse as her property. Subsequently, an execution against the same parties at the suit of P. was placed in the sheriff's hands. P.'s solicitors informed the sheriff of all the circumstances, and the sheriff, on 3rd October, obtained from the innkeeper a written undertaking to keep the horse, stated to be under seizure by the sheriff, until further orders from the sheriff. On 14th October the sheriff was notified of the plaintiff's claim,

whereupon, at his instance, an interpleader order was granted. On 31st December the Division Court interpleader was decided in plaintiff's favour, whereupon the sheriff at once notified the innkeeper that he did not claim any further right to hold the horse. Before the innkeeper had heard from the sheriff plaintiff demanded the horse, but he refused to deliver it up until his charges for keeping it were paid, but did not assert any right to hold for the sheriff. On 17th November part of the charges were paid, either by the Bank of Montreal or P., and the balance was subsequently paid by B. On 3rd November an order was made barring P.'s claim, and directing the sheriff to forthwith deliver up the horse to the plaintiff. On 14th November an action was brought against P., the Bank of Montreal, the sheriff and the bailiff, for conversion, etc., claiming the value of the horse, damages for loss of earnings, etc. About 3rd December, after the commencement of the action, the horse was tendered to the plaintiff, who refused to accept it, except on payment of damages and costs. No notice of action was given.

*Held*, that there could be no recovery against any of the parties, (1) that the bailiff should have had notice of action; (2) that there was nothing to connect the Bank or P. with the seizure; (3) that though there was what constituted a seizure by the sheriff so as to entitle him to interplead and to make the innkeeper liable if he had not kept the horse for him, the sheriff in no way interfered with plaintiff's possession or control over it, or in any way converted it to his own use, it being at the time in the custody of the law.

*Osler, Q.C.*, for the plaintiff.

*Hardy, Q.C.*, for the Bank of Montreal.

*Falconbridge, Q.C.*, for the sheriff.

*Fitzgerald*, for P.

*Aylesworth*, for the bailiff.

### ARSCOTT V. LILLEY ET AL.

*Magistrate—Action against—Conviction not quashed—Costs—R. S. O. ch. 73, secs. 4, 17—41 Vict. ch. 8 (O.)—O. J. Act, sec. 9, sub-sec. 2, Rule 428.*

*Held*, that the 4th sec. of R. S. O. ch. 73, as amended by 41 Vict. ch. 8 (O.), prevents an



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action being brought for anything done under a conviction, whether there was jurisdiction to make the conviction or not, so long as the conviction remains unquashed and in force.

*Held*, also, though doubting, that the 17th sec. of said Act, which entitles the magistrate to full costs as between attorney and client, where in such action he obtains a verdict in his favour, has been repealed by the O. J. Act, sec. 9, sub-sec. 2, and Rule 428; and that such costs are now in the discretion of the judge or Court.

*Osler*, Q.C., for the plaintiff.

*Hutchinson*, and *Aylesworth*, for the defendants.

#### CULVERWELL V. BIRNEY.

*Commission on sale of land.*

An agent selling land may recover commission from his principal, notwithstanding the agent has received commission from the purchaser, where the principal has agreed that the agent might receive such commission, or where the principal knows that the agent is selling and intends to obtain such commission, and does not object.

*J. K. Kerr*, Q.C., for the plaintiff.

*Fullerton*, for the defendant.

#### BAKER V. MILLS.

*Trespass—Damage to land—Entry by devisee.*

The plaintiffs claimed, as devisees of S., for damages alleged to have been sustained by them by reason of the cutting and removal of certain timber on land devised by S. to them. Prior to S.'s death he mortgaged the land to a building society who, after the alleged trespass, sold the land to the defendant. The land was uncultivated, and there had been no entry by the plaintiffs.

*Held*, that the action was not maintainable.

*Reeve*, Q.C., for the plaintiffs.

*Shepley*, contra.

#### CLEGG V. GRAND TRUNK RAILWAY CO.

*Accident—Negligence—44 Vic. ch. 22 (O.), 46 Vic. ch. 24 (D.)—Statement of claim—Omission of necessary averments.*

Action by plaintiff, an administrator of C., for damages under 44 Vic. ch. 22 (O.), by reason of the omission to pack a frog on the Midland Railway which defendants were operating.

*Held*, defendants were not liable, that the Midland Railway was a railway connecting with the defendants' railway, and under 46 Vic. ch. 24 (D.), was exempt from the operation of the Ontario Act.

*Held*, also, that by reason of the omission to state, as required by sub-sec. 2 of sec. 8 of said Act, and to prove in the statement of claim that the defendants knew that the frog was not packed, or that deceased did not know it, or that he had notified the defendants or any person superior to himself in the service of the defendants, or that such person was not aware thereof, would preclude any recovery.

*G. T. Blackstock*, for the plaintiff.

*Walter Nesbitt*, for the defendants.

#### AUSTIN MINING CO. V. GEMMEL.

*Company—Detention of books, etc., by secretary—Meeting for election of directors—Whether properly called—Quorum—Pleading.*

Action by plaintiffs, a mining company incorporated under the Canada Joint Stock Company's Act, 46 Vict. c. 43, by letters patent, against the defendant, whom it was alleged had ceased to be secretary of the company, for the conversion and detention of certain books, etc., of the company. The defendant set up as a defence that he was still secretary of the company, on the ground that the board of directors who had appointed a new secretary had not been legally elected, because the meeting for the election had not been duly called; and also that there was not a proper quorum to transact business.

*Held*, under the circumstances set out in the case, the meeting was duly called, and there was a proper quorum.

*Held*, also, that the defendant must be deemed to have unlawfully detained the books, etc. There was an election of directors *de facto*

[Prac.]

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and a suit in the company's name; and an officer of the company could not, as against the company, be permitted to withhold what belonged to the company. In any event the defence set up was not the proper way to test the election of the directors, but should have been by motion to dismiss the action.

The effect of the statute discussed.

*R. W. Scott, Q.C.*, for plaintiffs.

*Chrysler*, for defendant.

### ROBERTSON V DALEY.

*Statute of limitations—Possession—Squatter.*

In 1809, P., the owner of certain land, sold it to D., who went into possession and occupied till 1827 or 1828, when he was turned out by one Dufait who was put in possession and remained in possession until 1861, when he conveyed to one D., through whom the defendant claimed. D.'s actual possession had only been of about ten acres.

*Held*, that D.'s possession after 1828 would relate to the whole land, and could not be treated on the principle of a squatter so as to confer a possessory title only to the ten acres actually occupied.

*Small*, for the plaintiff.

*Scane* (of Chatham), for the defendant.

### PRACTICE.

*Wilson, C. J.* [November 5, 1885.  
Common Pleas Div.] [December 19, 1885.]

### PAISLEY V. BRODDY.

*Action on foreign judgment—Defence—Covenant—Foreclosure—Concealment—Nudum pactum—Fraud—Matters pleadable in original action.*

The plaintiff sued upon a foreign judgment, which he had obtained against the defendant upon a covenant by the defendant to indemnify him against a mortgage made by the plaintiff to one G., who had foreclosed the mortgage and afterwards obtained judgment against the plaintiff on the covenant.

*Held*, that the effect of G. suing on the covenant in the mortgage after foreclosure

was to open the foreclosure, and an allegation that the plaintiff had improperly concealed the fact of the foreclosure from the foreign Court was no defence to this action.

*Held*, also, that an allegation that G. had agreed to take the land in full satisfaction of his debt showed no defence, but a mere verbal agreement without consideration.

*Held*, also, that an allegation that the plaintiff had sustained no damage by the judgment and execution against him, and that the writs of *fi. fa* against him were retained in the sheriff's hands under a fraudulent agreement between G. and the plaintiff, in order to sustain the proceedings against the defendant, shewed no fraud and was no answer to the action.

*Per WILSON, C.J.*, the defendant was not at liberty to set up in answer to this action matters which could have been pleaded in the original cause.

*Schoff*, for the plaintiff.

*Tilt, Q.C.*, and *T. C. Milligan*, for the defendant.

Boyd, C.]

[January 13, 1886.]

### COTTINGHAM V. COTTINGHAM.

*Fund in Court—Assignment—Notice to Accountant—Stop order—Judgment—Payment out.*

The proper practice when money in Court has been assigned is to get an order to pay to the assignee only, or not to pay to the assignor without notice to the assignee.

Mere notice to the Accountant of an assignment of the fund is of no avail against a stop order afterwards obtained by another assignee under a prior assignment.

An assignee of a fund in Court has a right to apply for a stop order by virtue of his assignment, without any judgment in his favour.

The lodging of an assignment and power of attorney with the Accountant is sufficient under the practice to justify payment out in the absence of any other claim.

*Watson*, for the claimant Hudspeth.

*Small*, for the claimant Hargreaves.

## LAW SOCIETY OF UPPER CANADA.

## REPORTS.

## ENGLAND.

## RECENT ENGLISH PRACTICE CASES.

IN RE ISAAC.

JACOB V. ISAAC.

*Married woman suing alone—Security for costs—*  
(Ont. R. 97).

When a married woman is authorized to sue alone, as a *feme sole*, she cannot be required to give security for costs merely because she has no separate estate.

[C. A.—30 Chy. D. 418.]

COTTON, L.J. . . This Court must deal with the Act as it stands, and that Act (Married Woman's Property Act, 1882) does say in sec. 1, ss. 2, that a married woman can sue as a *feme sole*. The Court never required a *feme sole* to give security for the costs of an action any more than any other plaintiff.

LINDLEY, L.J., concurred.

Appeal from BACON, V.-C., dismissed.

## FLOTSAM AND JETSAM.

LAW LATIN IN THE TIME OF CHARLES I.—"Robert Randle, of Ipplepen, was brought up for shooting a woodcock. Probably he was one of the first persons who ever succeeded in hitting one, and when we consider the 'hand gun and hail shot' of the period, the feat may appear worthy of admiration, rather than punishment. The witness, no doubt, spoke not of his shooting, but of his 'shutting' the woodcock, exactly as a Devonshire witness would speak at the present day. The clerk of the peace was evidently not much of a Latinist, but he was still less of a sportsman, and he saw no harm in translating shutting into *claudendo*. So he entered in his book that the prisoner was fined 'xx's *pro claudendo cum hayle shott and killing a woodcocke*,' and bound over in £20, '*sub conditione quod non clauderet iterum*.' This nearly parallels the case where an offender was indicted for stealing '*duos suspensores et unum adolescentiorem*'—two hangers and one ladder."—A. H. A. Hamilton's *Quarter Sessions*, p. 112.

## Law Society of Upper Canada.

## SUBJECTS FOR EXAMINATIONS.

## Articled Clerks.

- 1884 and 1885. { Arithmetic.  
Euclid, Bb. I., II., and III.  
English Grammar and Composition.  
English History—Queen Anne to George III.  
Modern Geography—North America and Europe.  
Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

## Students-at-Law.

1884. { Cicero, Cato Major.  
Virgil, *Æneid*, B. V., vv. 1-361.  
Ovid, *Fasti*, B. I., vv. 1-300.  
Xenophon, *Anabasis*, B. II.  
Homer, *Iliad*, B. IV.  
1885. { Xenophon, *Anabasis*, B. V.  
Homer, *Iliad*, B. IV.  
Cicero, Cato Major.  
Virgil, *Æneid*, B. I., vv. 1-304.  
Ovid, *Fasti*, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

## ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

## FRENCH.

A paper on Grammar.

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

## LAW SOCIETY OF UPPER CANADA.

## OF NATURAL PHILOSOPHY.

*Books*—Arnett's elements of Physics, and Somerville's Physical Geography.

*First Intermediate.*

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

*Second Intermediate.*

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

*For Certificate of Fitness.*

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

*For Call.*

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any University in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchler, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six

## LAW SOCIETY OF UPPER CANADA.

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchler, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## F E E S .

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above .....	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

## PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890

*Students-at-law.*

## CLASSICS.

1886.	Cicero, Cato Major.
	Virgil, Æneid, B. I., vv. 1-304.
	Cæsar, Bellum Britannicum.
	Xenophon, Anabasis, B. V.
	Homer, Iliad, B. VI.
1887.	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. VI.
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. I.
	Cæsar, Bellum Britannicum.
1888.	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. IV.
	Cæsar, B. G. I. (vv. 1-133.)
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. IV.
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. V.
	Cæsar, B. G. I. (vv. 1-33)
1890.	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. VI.
	Cicero, In Catilinam, II.
	Virgil, Æneid, B. V.
	Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

## MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

## ENGLISH.

A Paper on English Grammar.

Composition.

Critical reading of a Selected Poem:—

1886—Coleridge, Ancient Mariner and Christabel.

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

## HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe. Optional Subjects instead of Greek:—

## FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886

1888 } Souvestre, Un Philosophe sous le toits.

1890

1887 } Lamartine, Christophe Colomb.

1889

## or, NATURAL PHILOSOPHY.

*Books*—Arnot's Elements of Physics; *or* Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

## ARTICLED CLERKS.

Cicero, Cato Major; *or*, Virgil, Æneid, B. I., vv. 1-304, in the year 1886: and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe. Elements of Book-Keeping.

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.

# Canada Law Journal.

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No. 4.

## DIARY FOR FEBRUARY.

- 16 Tues...Sittings of Supreme Court Canada begin  
18 Thur...Sittings of Divisional Court of Chan. Div. begin.  
21 Sun...Septuagesima Sunday.  
23 Sun...Sexagesima Sunday.

TORONTO, FEBRUARY 15, 1886.

Two correspondents send in specimens of a new style of advertisement, sent to their clients by a New York attorney. It is in the shape of a post card, on which is given a well executed engraving of the advertiser, who concludes his laudatory observations on himself by saying: "We are neither too dignified or modest to ask for work." This is honest and above board, if not professional.

THE dinner on Thursday evening last, was from a material point of view a decided success, and reflected great credit on the committee. There was plenty to eat, plenty to drink, and plenty of noise. In fact, we think we are well within the mark in saying there was at least ninety per cent. too much of the last named element of conviviality. Much to the annoyance of everybody else, a handful of individuals present seemed to think there was nothing unseemly, nothing disrespectful, in treating the eight or nine Superior Court Judges, and the other gentlemen of seniority and position, who attended the dinner to a mingled assortment of popular songs, cries of "rats," "how do ye do," "put 'em on the list," and inarticulate noises, and senseless clamour of various descriptions. They probably considered that they were having a "high old time."

For our own part, however, it struck us as not "high" but the reverse, and not "old" but very, very "young," and we could not help wishing that the judges who honoured the banquet would exercise their united jurisdictions by enjoining to perpetual silence the principal offenders. Nothing of the sort occurred at the dinner of the Legal and Literary Society last year. Let us hope that nothing of the kind will ever occur again.

It is really of some importance that these annual professional gatherings should continue. They are calculated to draw the profession together, and to create *esprit de corps* among the members of it. Perhaps, however, it may be better henceforth to make the dinner an exclusively Bar dinner. It does not do to make the numbers too great, and we would suggest that the dinners of the Legal and Literary Society and of the Bar should be held on separate occasions. We would further venture to suggest that on no account should extra orders for wine be permitted. If the amount of wine consumed had been confined to what was supplied by the committee there would have been far less of what the chairman euphemistically called "enthusiasm." It is hard to get any "forrarder" on claret, or even pale sherry; but champagne would appear to present too great attractions to some, whom we would like to sentence to a prolonged diet of toast-and-water. Lastly, we would add that it would be a result which we feel sure would be regretted by the vast majority of barristers and students if the occupants of the Bench should cease to join in these annual reunions.

## THE BAR DINNER—DECENTRALIZATION AND ITS EVILS.

A GENTLEMAN of the Pennsylvania Bar, in the course of a clever and entertaining speech at the dinner, made the somewhat curious statement that for ways that are dark, and tricks that are vain, the American Bar is peculiar. If we were stupid enough to take the joke seriously, we should say that we are sorry for it. We should not notice it, however, were it not that he went on to say, somewhat emphatically, that the American Bar and the Canadian Bar were brethren, implying a decided connection between the two remarks. Now the Bar in England, and we hope in Canada, has always been the profession of a gentleman. It would cease to be so if it was not characterized by the highest possible tone and most scrupulous sense of honour. These two qualities are not compatible with over-much trickiness, and we sincerely hope that if we are indeed brethren to our American neighbours the link of affinity will be found to rest on something else than the darkness of our ways or the vanity of our tricks.

MR. McLAREN'S speech at the dinner is deserving of notice. His earnest protest against the policy of decentralization, which is now so much in favour with some of our county brethren, is all the more valuable, coming as it does, from one who has had full experience of its baneful effects. As a member of the Lower Canada Bar, Mr. McLaren was able to contrast the relative merits of the two systems as displayed in Quebec and Ontario. In the former, decentralization has resulted, according to his testimony, in the most serious deterioration of both the Bench and the Bar of that Province, and yet it is to this goal that some of our brethren would lead us. The advantage of having the judges of the High Court scattered through the Province would consist in enabling country practitioners to argue their own cases.

They would thereby save some money which is now paid to counsel at Toronto; but at what a lamentable cost to the country? Such a system, from the nature of things, would inevitably result in poor advocates and poor judges. Judicial and forensic ability is not acquired merely by reading. One of the most important factors for success, either on the Bench or at the Bar is experience, and experience can only be acquired by a constant and varied practice.

Able and experienced judges cannot, as a rule, be expected to be produced by a Bar whose average experience is merely that of a country practitioner—from the simple fact that the business of any one county is insufficient to afford that variety and quantity of work without which the necessary experience for making a good judge or a good advocate cannot be gained.

Even without decentralization the number of counsel who, on their merits, are entitled to stand in the front rank of the profession is exceedingly small. Out of the whole ten or twelve hundred barristers, not more than twenty, if indeed so many, can fairly be said to have attained eminence, and we may be sure that even this small number would disappear if the decentralization craze were carried out, as some desire, and the whole Bar would then sink to the level of a dismal mediocrity.

We trust that those who have favoured any such schemes will have the good sense and patriotism to have regard to what Mr. McLaren has said on the subject, and to refrain from urging their adoption, fraught as they are with such manifest danger to the best interests of the public. Self-interest, no doubt, is a very powerful motive to action; but the members of a liberal profession owe some regard both to the public interests and the honour and dignity of the profession to which they belong.

## ELECTION LAW FOR LADIES.

## ELECTION LAW FOR LADIES.

In a note to his forthcoming edition of the Dominion Franchise Act, Mr. Thomas Hodgins, Q.C., has given a summary of the cases which throw some light on the "rights of women" in respect to their holding of public offices and their right to vote.

Some of the cases lead to the inference that the judicial assertion of the legal incapacity of women voting at Parliamentary elections draws its inspiration from Lord Coke's observations on the right of the *Procuratores Cleri*, or spiritual assistants of Parliament, to represent the clergy, because the clergy were not parties to the election of knights, citizens and burgesses. Lord Coke says (4 Co. Ins. 4):—"In many cases multitudes are bound by Acts of Parliament which are not parties to the elections of knights, citizens and burgesses; as all they that have no freehold, or have freehold in ancient demesne, and *all women having freehold*, or no freehold, and men within the age of twenty-one years," etc. Sir William Bovill, C.J., in *Charlton v. Lings*, L. R. 4 C. P. 374, cites this reference with approval, thus:—"Lord Coke, in the 4th Institute, p. 5, treats it as clear law in the time of James I. that women were incapacitated from voting;" and after admitting that "possibly instances may be found, in early times, not only of women having voted, but also of their having assisted in the deliberations of the Legislature," he adds: "But these instances are of comparatively little weight as opposed to the uninterrupted usage to the contrary for centuries; and what has been commonly received, and acquiesced in, as the law, raises a strong presumption of what the law is."

Mr. Hodgins has with some industry and research, collected a number of references on the "Law of women's rights to hold office and vote," which he has ap-

pended as a note to the statutory definition of "Person" in his edition of the Franchise Act. And as spinsters and widows have lately obtained the right to vote, and have voted, in municipal elections, we need not be surprised should their long lost right to vote at parliamentary elections come back to them after many years. The note is as follows:—

(c) A woman is not a "person" within the meaning of the Act, and cannot appeal from the decision of the Revising Barrister: *Wilson v. Salford*, L. R. 4 C. P. 398. Women, being under legal incapacity, have no common law right to vote at Parliamentary elections, though possessing the requisite property qualification: *Charlton v. Lings*, *Ibid.* 374. "Persons disabled from voting at elections are those who, holding freehold lands and tenements, either lie under natural incapacities, and therefore cannot exercise a sound discretion, or are so much under the influence of others that they cannot have a will of their own in the choice of candidates: of the former are women, infants, idiots and lunatics; of the latter, persons receiving alms and revenue officers:" Heywood on Elections, 159. Women are disqualified at common law in Ireland: Hudson on Elections, 159; and also in Scotland "by a long and uninterrupted custom": *Brown v. Ingram*, 7 Sess. Ca. (3rd. ser.) 281. In the United States, a female who possessed all the qualifications entitling a person to vote, except that she was not a male, voted at an election for a member of Congress: *Held*, that she was rightly convicted for knowingly voting at such election without having a lawful right to vote: *United States v. Anthony*, 11 Blatch, 200. Though a woman has no common law right to vote at elections of members of Parliament, she appears to be capable of holding many public offices—such as Queen: "Queen regnant is she who holds the crown in her own right," 1 Bl. Com. 219; also Marshall, Great Chamberlain, and Champion of England, 2 T. R. 397; Constable of England, 3 Dyer, 285b. Anne, Countess of Pembroke, held the office of hereditary Sheriff of Westmoreland, and exercised it in person. At the Assizes of Appleby she sat with the Judges on the Bench: 2 T. R. 397, note (a). Lucy, Countess of Kent, was returning officer, and signed the indenture and return of the member for the County of York in 1412. And in 1415, Margaret, widow of Sir H. Vavaseur, also acted and signed a similar indenture. So Lady Elizabeth Copley made the return for the Borough of Gatton in 1553, and again in 1555. Dame Dorothy Packington



## ELECTION LAW FOR LADIES.

also acted as Returning Officer, and made the return of the two members for Aylesbury in 1572: Prynn's Brev. Parl. 152. And in 1628 the return of a member for Gatton was made by Mrs. Copley, *et omnes inhabitantes*: Heywood on Elections, 160. Before Lord Coke promulgated his opinion that "women having freehold" were not parties to elections, it was said to be the opinion of the judges that a *feme sole*, if she has a freehold, might vote for members of Parliament; *Catharine v. Surrey*, cited 7 Mod. 264. Women, when *sole*, had a power to vote for members of Parliament: *Coates v. Lisle*, 14 Jac. 1, cited *Ibid.* 265. A *feme sole* freeholder may claim a voice for Parliament-men; but, if married, her husband must vote for her: *Holt v. Lyle*, 4 Jac. 1, cited *Ibid.* 271. "The case of *Holt v. Lyle* is a very strong case:" *per* Probyn, J., in *Olive v. Ingram*, *Ibid.* 267. "Whether women have not anciently voted for members of Parliament, either by themselves or attorney, is a great doubt. I do not know upon enquiry but it might be found that they have:" *per* Lee, C.J., in *Ibid.* "Possibly other instances may be found in early times, not only of women having voted, but also of their having assisted in the deliberations of the Legislature:" *per* Bovill, C.J., in *Charlton v. Lings*, L. R. 4 C. P. 383. Votes given by women at a Parliamentary election in Canada, were not struck off on the mere *prima facie* evidence of the poll book: Halton (1844), Patrick's El. Cas. 59. Women, not having men at all, may be struck off the poll on a scrutiny of votes: 1 O.M. & H. 159. Widows and spinsters were burgesses of Lyme Regis in 1577: 2 Lud. 13. By the custom of the ancient Britons "women had prerogative in deliberative sessions touching either peace, government, or martial affairs:" 3 Selden's Works, 10, cited L. R. 4 C. P. 389. Coming to Saxon times we find it stated: "All *fiefs* were originally masculine, and women were excluded from the succession of them, because they cannot keep secrets:" West on Peers, 44, cited 7 Mod. 272. "A woman is excluded from military tenures and from councils *quia quæ audit reticere non potest*:" Wright's Tendars, 28. "A woman cannot be a pastor by the law of God. I say more, it is against the law of the realm:" *per* Hobart, C.J., Hob. R. 148. A woman may be a commissioner of sewers, which office is judicial: Callis, 250; and Clerk of the Crown in the King's Bench: 7 Mod. 270; governor of a workhouse: 2 Ld. Ray. 1014; sexton of a parish church in London: 2 Stra. 1114; keeper of the prison of the gatehouse of the dean and chapter of Westminster: 3 Salk. 2; governess of a workhouse at Chelmsford: 13 Vin. Abr. 159; custodian of a castle: Cro. Jac. 18, 13 Vin. Abr. 159

constable at the Sheriff's Court: 2 Hawk. P. C. c. 10, s. 36; which is an office of trust and likewise in a degree judicial: 2 T. R. 406; gaoler: 2 T. R. 397; overseer of the poor: *Ibid.* 395. Although it is uncouth in our law to have women Justices and commissioners and to sit in places of judicature, yet by the authorities this is a point worth insisting upon, both in human and divine learning; for in the first commission ever granted (Genesis i. 28), by virtue of the word *dominamini* in the plural, God coupled the woman in the commission with man: Callis (1685), 250. Women who were housekeepers, and paid church and poor rates, were entitled to vote for a sexton: 2 Stra. 1114. Women may vote for churchwardens: 23 Gr. 49. "It might be more reasonable that one or more churchwardens should be women than men; one-half the congregation are likely to be women, and a female overseer would be able to watch over their conduct, to counsel and advise them, better than men:" *per* Proudfoot, V.C., *Ibid.* In municipal elections, spinsters and widows who are rated for property are entitled to vote, but they lose that right on their marriage: *Reg. v. Harrold*, L. R. 7 Q. B. 361. Marriage is at common law a total disqualification, and a married woman could not, therefore, vote, her existence for such a purpose being entirely merged in that of her husband: *Ibid.* Nor can it be supposed that the statute which was passed *alio intuitu* has by a side wind given them political rights: *Ibid.* A *feme covert* can do no act to estop herself at law: *per* Lord Kenyon, C.J., 7 T. R. 539. *Contra* in equity: 1 Mac. & Gor. 599. "The policy of the law thought women unfit to judge of public things, and placed them on a footing with infants; by 7 & 8 Wm. III. c. 25, infants cannot vote—and women are perpetual infants:" *per* Strange, Sol.-Gen., 7 Mod. 272. Under our present political system, the legislative, executive and judicial functions of the government are carried on in the name of a woman: "Her Majesty, etc., enacts," or "commands," etc.; yet women, because of their sex, are said to be "disqualified by the common law" from having any voice or representation in the process of legislation or government.

## RECENT ENGLISH DECISIONS.

## RECENT ENGLISH DECISIONS.

The *Law Reports* for December comprise 15 Q. B. D. pp. 561-711: 10 P. D. pp. 137-199; 30 Chy. D. pp. 191-657; and 10 App. Cas. pp. 437-679.

BAIL IN CRIMINAL CASE—DEPOSIT OF MONEY WITH  
BAIL AS INDEMNITY.

Taking up first the cases in the Queen's Bench Division the first to be noted is *Herman v. Feuchner*, 15 Q. B. D. 561, a decision of the Court of Appeal overruling the judgment of Stephen, J., and the case of *Wilson v. Strigell*, 7 Q. B. D. 548, on which he proceeded. The plaintiff, having been convicted of keeping a disorderly house, had been ordered to find sureties in £50 for his good behaviour for two years. He applied to the defendant to become surety for him, but the defendant refused to do so unless the amount for which he was to become surety should be deposited with him for two years. The plaintiff accordingly deposited with the defendant £49, and the defendant became surety. Before the expiration of the two years the plaintiff brought the present action to recover the money. Stephen, J., at the trial gave judgment in his favour, but the Court of Appeal held the transaction illegal, and that no action would lie before or after the specified period, although the plaintiff had not committed any default, and although the surety had not been called on to pay the amount for which he had become bound. Brett, M.R., speaking of the effect of the contract, says:—

To my mind it is illegal, because it takes away the protection which the law affords for securing the good behaviour of the plaintiff. When a man is ordered to find bail, and a surety becomes responsible for him, the surety is bound at his peril to see that his principal obeys the order of the Court; at least this is the rule in the criminal law, but if money to the amount for which the surety is bound is deposited with him as an indemnity against any loss which he may sustain by reason of his principal's conduct, the surety has no interest in taking care that the condition of the recognizance is performed. Therefore, the contract between the plaintiff and defendant is tainted with illegality.

In *Langlois v. Baby*, 11 Gr. 1, it was held equally illegal to indemnify bail in a civil case,

and see *Emes v. Barber*, 15 Gr. 679, and *Mendell v. Tinkiss*, 6 O. R. 625.

ARBITRATION—TORTS—DEATH OF PARTY BEFORE  
AWARD.

In *Bowker v. Evans*, 15 Q. B. D. 565, we have another decision of the Court of Appeal affirming the judgment of a Divisional Court. The case is an illustration of the maxim "*actio personalis moritur cum persona*." The parties to an action of tort agreed, before trial, to an order referring the matter in dispute to an arbitrator. The order provided that the arbitrator should publish his award, "ready to be delivered to the parties in difference, or such of them as required the same (or their respective personal representatives, if either of the said parties die before the making of the award)." After the hearing of the evidence, but before the award was made, the plaintiff died. The arbitrator afterwards published his award; the plaintiff's executors proved his will and took up the award, and, having applied to be substituted as plaintiffs in place of their testator, Field, J., granted the order, which was subsequently set aside on appeal to a Divisional Court, which latter decision the Court of Appeal now affirm. Brett, M.R., says at p. 568:—

The stipulation as to the delivery of the award to the respective personal representatives of the parties, if either of them dies before the making of it, being a matter of mere procedure, it has become absolutely futile, and has no meaning and no sense, and must be struck out of the order of reference; that is, the order of reference must be read as if the stipulation were omitted, the action being in tort. The stipulation has been introduced inadvertently, and we must decide the appeal on the footing that the cause of action was gone on the death of the plaintiff, that the jurisdiction of the arbitrator then determined; that there was nothing for him to decide, and that his award cannot be enforced.

COMPOSITION ARRANGEMENT—SECRET BARGAIN TO GIVE  
CREDITOR A BONUS IN ADDITION TO COMPOSITION.

*Re Milner*, 15 Q. B. D. 605, although a bankruptcy case, is one re-affirming an important principle of law, applicable to all composition arrangements between a debtor and his creditors. The Court of Appeal lays down the rule that any secret understanding or bargain with any creditor signing a composition deed that

## RECENT ENGLISH DECISIONS.

he is to get more than the composition payable under the deed, whether the additional sum is to be paid by the debtor, or by some third person with the debtor's privity, invalidates the deed as to all other creditors, whether they have signed it before or after the making of the secret bargain. This principle of law is very clearly stated by the Master of the Rolls thus:—

Equality among the creditors is an implied condition of such an arrangement, and if the arrangement is carried into effect by a deed this becomes an implied condition of the deed, and if this condition is not carried out, any creditor who has executed the deed is no longer bound by it, even if the breach of the condition takes place after his execution. Then the case of *Knight v. Hunt*, 5 Bing. 432, carries the principle still further, for it decides that it is immaterial whether the bribery is to be carried out at the expense of the debtor or not; if one of the creditors derives an advantage from some other person than the debtor, still he has broken faith with the other creditors, and they are entitled to say that they are not bound by the deed. I should hesitate to say that this would be so, if the preferential payment was made without the knowledge of the debtor.

## CONTRACT—CARRIERS OF GOODS—PRIVITY OF CONTRACT.

The question involved in *The Great Western Railway Co. v. Bagge*, 15 Q. B. D. 625, appears to have been a simple one. The defendants had delivered some goods to the plaintiffs to be returned to the owner; the consignment note stated that the freight was to be paid by the consignees, and that the defendants requested the plaintiffs to receive and forward the goods as per address and particulars on the note, and on the conditions stated therein. The plaintiffs delivered the goods to the consignees who refused to pay the freight, on the ground that the defendants had agreed to pay it. The action was brought to recover the freight from the defendants. A County Court judge held that there was no contract by the defendants to pay the freight, but a Divisional Court, composed of Coleridge, C. J., and Mathew, J., reversed this decision and gave judgment in favour of the plaintiffs. Coleridge, C. J., thus construes the contract between the parties:—

The consignors say, we wish to forward these goods to the consignee, who, between us and him, has agreed to pay; forward them for us, and if you do that work for us, if the consignee does not pay,

there is the resulting contract that we will pay; because we have handed the goods to you, you have taken them for us and have performed the work which you undertook with us you were to perform.

EASEMENT—PRESCRIPTION—2 & 3 W. IV., c. 71, s. 8—  
(R. S. O. c. 108, s. 41.)

*Symons v. Leaker*, 15 Q. B. D. 629, we have already noticed, *ante* p. 385, when referring to the earlier report of the case which appeared in the *Law Times* Reports. It is only necessary here to say that the case decides that a remainderman is not a "reversioner" within R. S. O. c. 108, s. 41, and consequently has not the additional time for resisting a claim to an easement by prescription which that section reserves to "a person entitled to a reversion expectant on the determination" of a term.

COSTS—ORDER ON SOLICITOR PERSONALLY TO PAY  
COSTS—APPEAL.

The case of *Re Bradford*, 15 Q. B. D. 635, is a somewhat ancient one, having been decided in 1883, and of which a report appeared long since in 50 L. T. N. S. 170, and in which the Court of Appeal held, reversing the judgment of a Divisional Court, that when an order is made on a solicitor to pay costs personally, an appeal from the order lies to a Divisional Court without leave, on the ground that the Court has no power to order a solicitor to pay costs personally, unless he has been guilty of some misconduct or negligence, and therefore an appeal in such a case is not an appeal "as to costs only which by law are left to the discretion of the Court." See Ont. Jud. Act, s. 32.

## MARRIED WOMAN—ACTION FOR TORT—LIMITATIONS.

The only remaining case to be noticed in the Queen's Bench Division is *Lowe v. Fox*, 15 Q. B. D. 667, in which the Court of Appeal held that a married woman may, since the Married Woman's Property Act, 1882 (47 Vict. ch. 9 O.), maintain an action for an assault and false imprisonment committed before the coming into operation of that Act, even though the course of action occurred more than four years before the suit, provided the action be brought within four years after the Act came into force, as thereby she became "discover" within the meaning of 21 Jac. I. c. 16, s. 7.

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## EVIDENCE—ADMISSION BY MASTER OF SHIP.

Turning now to the cases in the Probate Division we find only two necessary to be noticed here. The first is *The Solway*, 10 P. D. 137, in which the short point is how far a letter of a master of a ship to her owners was evidence against the owners; and it was held by the President, Sir Jas. Hannen, that the letter was evidence against the owners in regard to the facts stated therein, but that the opinion of the master expressed in such a letter is not evidence.

## SEPARATION DEED—AGREEMENT NOT TO SUE FOR RESTITUTION OF CONJUGAL RIGHTS—PUBLIC POLICY.

The other case in the Probate Division which we think it useful to note is *Clark v. Clark*, 10 P. D. 188. It may be remembered that at one time it was considered that the living of husband and wife apart is against the policy of the law, and therefore that the Court should neither sanction nor enforce agreements of that kind. An instance of this may be found in our own Courts in the case of *Gracey v. Gracey*, 17 Gr. 114, where Spragge, C., refused to make a decree for alimony upon the consent of the parties, considering that it was incumbent on the wife to make out a case on the merits for the intervention of the Court. This view of the law was, however, considered by Strong, V.C., to be contrary to the current of the later English decisions, and in *Henderson v. Buskin*, which came before him in 1873, he declined to adopt the rule laid down in *Gracey v. Gracey*. The case of *Clark v. Clark* confirms the opinion of Strong, V.C. The question in that case was as to the validity of an agreement entered into by a wife for valuable consideration, and without fraud or duress, that she would not take proceedings to compel her husband to return to cohabitation; and the Court of Appeal held that it was a valid agreement and a bar to proceedings for restitution of conjugal rights. The case is also noteworthy from the fact that the Court held that the recital of the agreement to live separate, being contained in a deed to which the wife was a party, was evidence of a contract by her to allow her husband to live separate from her, and that after accepting the benefits under the deed, she could not be heard to say that she had not contracted, because the covenant not to sue

was entered into only by the trustees and not by her. The following opinion of Sir James Hannen in *Marshall v. Marshall*, 5 P. D. 19, was quoted by Baggallay, L.J., with approval:—

There has been considerable fluctuation of opinion as to the extent to which voluntary engagements of married persons to live separate should be recognized by the Courts of law. But since the decision of the House of Lords in *Wilson v. Wilson*, 1 H. L. C. 538, it can no longer be contended that there is anything illegal or contrary to public policy in an agreement between married persons that no suit for restitution of conjugal rights shall be instituted by either of them. For my own part I must say that the opinion I have formed after several years' experience in the administration of the law in this Court is that it is in the highest degree desirable, for the preservation of the peace and reputation of families, that such agreements should be encouraged, rather than that the parties should be forced to expose their matrimonial differences in a Court of justice.

We may also observe that upon the argument of the appeal the junior counsel for the respondent disputed the authority of *Marshall v. Marshall*, which his leader did not desire to impugn, and the Court, though thinking it inconvenient, nevertheless, entertained the junior's argument on this point. See *ante*, Vol. XIX., p. 358.

## ASSIGNMENT OF DEBT—MARSHALLING—LIEN.

We turn now to the cases in the Chancery Division. *Webb v. Smith*, 30 Chy. D. 192, is described by Lindley, L.J., as an "experiment." It was an attempt to invoke the doctrine of marshalling under the following circumstances. The defendants were auctioneers and had two funds in their hands belonging to a man named Canning; one of these funds consisted of the proceeds of some furniture, and the other was part of the proceeds of the sale of a brewery, on which latter fund the defendants had a lien for their charges in connection with the sale. Canning, being indebted to the plaintiff, gave him a letter charging the proceeds of the sale of the brewery with the payment of his debt; this letter was sent to the defendants who acknowledged its receipt, and afterwards paid Canning the proceeds of the furniture, and applied the balance of the proceeds of the brewery to the payment of their charges. The plaintiff contended that the defendants should have marshalled the funds in their

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favour, and have deducted their charges for the sale of the brewery from the proceeds of the sale of the furniture; but the Court of Appeal (reversing Bacon, V.C.) held that the doctrine of marshalling had no application to such a case from the fact that the defendants had not a lien on both funds for their charges for the sale of the brewery, but only on the fund realized by that sale, and as to the other fund they had at most a right of retainer or set-off; and, further, that the doctrine of marshalling applies only when the funds in question are under the control of the Court. But Lindley, L.J., said that he did not think the defendants could have deprived the plaintiff of the benefit of his charge if there had been two funds to which they might have resorted under equal circumstances.

## WILL—OPTION TO PURCHASE.

*In re Cousins, Alexander v. Cross*, 30 Chy. D. 203, the question was whether a right of purchase given by a will could be exercised by the executors of the person to whom the option was given. Bacon, V.C., held that it could; but the Court of Appeal reversed this decision, and held that it was a personal right which did not pass to the executors. The occasion of the contention is thus summarized by the Master of the Rolls. He says:—

Now, how is it the dispute has arisen? It has arisen by an accident. Cardiff is a wonderful place, as everybody who has been there knows; and Cardiff, for some reason or other, either by reason of the extension of the docks and other works, or by the careful superintendence and personal interest of its great proprietor, Lord Bute, has jumped up into a town double or treble the size that it was; not according to its natural growth, but according to a sudden artificial increase; and therefore this hotel, which was probably worth £10,000, has jumped up to a largely increased value, and immediately there is a law suit, and with the admirable ingenuity of lawyers of every description they try to make out of a man's will what he did not say, and what he never thought of.

How far this can be said to be complimentary to the profession we are not prepared to say.

## WILL—MORTGAGE OF TURNPIKE TOLLS AND TOLL-HOUSES, NOT REAL SECURITY.

In the case of *Cavendish v. Cavendish*, 30 Chy. D. 227, the Court of Appeal reversed the de-

cision of North, J., 24 Chy. D. 685, upon the construction of a will whereby the testator had made a specific bequest of all moneys, stocks, funds, shares and other securities, "except mortgages on real and leasehold security," the point in controversy being whether or not mortgages of turnpike road tolls and toll-houses were within the exception. North, J., held that they were; but the Court of Appeal decided that they were not, the latter Court being guided to this decision by a reference to other parts of the will in which the testator disposed of mortgages on freehold and copyhold hereditaments, and also by the fact that turnpike securities are not ordinarily called "mortgages."

Brett, M.R., thus laid down the canon of construction to be adopted:—

Unless I am dealing with questions as to real property, and unless the words are conveyancers' language which has been received and adopted in a certain sense for years, I am for construing every will by itself according to the ordinary meaning of ordinary people using the English language.

I think that the person who drew this will did not go into the refinement of considering whether, in point of law, money lent on turnpike tolls was money lent on real property or not. He was not dealing with matters of that kind. Any person would call the piece of parchment upon which the mortgage was drawn up a security for money; he would not call it a mortgage on real or leasehold property.

## WILL—CONSTRUCTION—LAPSE BY DEATH OF LEGATEE

The following case of *In re Roberts, Tarleton v. Bruton*, 30 Chy. D. 234, is another decision of the Court of Appeal upon the construction of a will. The testator bequeathed the residue of his estate to trustees upon trust for a nephew and three nieces equally, and in case any or either of them should die under twenty-one he directed that the share or shares of the parties so dying, whether original or accruing, should go to the other or others of them; but he provided that the trustees should retain the shares of the nieces upon trust for the niece for life for her separate use, and after her decease as to the capital upon trust as she should appoint, and in default of appointment for her issue who should attain twenty-one, or marry, and in default of such issue for her next of kin. One of the nieces married and predeceased the testator, leaving a child who

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survived him, and the question was whether one-fourth share of the residue had lapsed, or whether the child of the deceased niece was entitled to it contingently on her attaining twenty-one, or marrying. Mr. Justice Pearson held that the share lapsed, and the Court of Appeal affirmed his decision.

## AMENDING ORDER—ORDER PASSED AND ENTERED.

The Court of Appeal, *Re Swire, Mellor v. Swire*, 30 Chy. D. 239, held that though it is the proper practice to move to vary the minutes of an order which has been improperly settled by the registrar; yet that when that course has been omitted, the Court may, on motion, amend the order if it does not in fact conform to the judgment of the Court pronouncing it, even after it has been passed and entered, without putting the party to an appeal; but the costs of the application under such circumstances were ordered to be borne by the applicant.

## AUTHORITY OF SOLICITOR TO RECEIVE MONEY—POSSESSION BY SOLICITOR OF TRANSFER DEED EXECUTED BY CLIENT.

The case of *Gordon v. James*, 30 Chy. D. 249, arose out of the fraud of a firm of solicitors, one of whom bore the appropriate name of "Dodge," and was a contest between two innocent parties as to who should bear the loss occasioned by the fraud. The plaintiffs were mortgagees for £1,000, and their solicitors, who had the title deeds in their custody, without the plaintiff's authority applied to the defendant in 1878 to buy the mortgage. The defendant bought the mortgage, and gave the solicitors £1,000. The solicitors afterwards procured from the plaintiffs a transfer of the mortgage to the defendant, with a receipt for the purchase money endorsed, representing that it was a reconveyance of the property to the mortgagor on his paying off the mortgage. This deed was shortly afterwards handed to the defendant, and the solicitors henceforth paid him interest as if they had received it from the mortgagor, whereas the latter was paying it to the agents of the plaintiffs who made no enquiry about the mortgage, and this went on until 1883 when the solicitors became bankrupt, and the £1,000 paid by the defendant, which was never handed over to the plaintiffs, was lost. The present action was brought by the plaintiffs claiming a vendors' lien. The

Vice-Chancellor of the County Palatine dismissed the action, and the Court of Appeal affirmed his judgment on the ground that the plaintiffs, by handing the deed of transfer and receipt to the solicitors, had enabled them to represent to the defendant that the £1,000 previously paid by him had been handed to the plaintiffs, and that this raised a counter-equity in favour of the defendant which prevented the plaintiffs succeeding. But the Court said the case would have been different if the £1,000 had been paid to the solicitors at the time the deed of transfer was handed over by them, in which case, assuming the solicitors had no authority to receive it, the defendant would not have been protected. The point of the decision is neatly stated by Cotton, L. J.:—

The plaintiffs, though dealing innocently, have, by negligence, put into the hands of their agent the means of representing that that money had in fact come to their hands, cannot now insist on their vendors' lien, which is inconsistent with the representation then made by their agent, and which they, by their own act, enabled him to make.

That the plaintiffs were trustees it is almost needless to state.

## REAL PROPERTY LIMITATION ACT, 37 &amp; 38 VICT. C. 57 S. 8 (R. S. O. C. 108, s. 23)—BOND BY SURETIES FOR PAYMENT OF MORTGAGE.

Two points were determined in *In re Powers, Lindsell v. Phillips*, 30 Chy. D. 291, by the Court of Appeal—one a point of practice, and the other a point of law. The plaintiff applied on what is called an originating summons (which is a proceeding equivalent to an application by motion in Chambers under our practice) for the administration of the estate of a deceased person. There was no dispute as to the facts, but there was a dispute as to whether, upon the undisputed facts, the plaintiff's claim was barred by the Statute of Limitations. Bacon, V.C., before whom the originating summons was returnable, refused to determine the point and dismissed the summons, on the ground that when the plaintiff's debt is disputed the question ought not to be determined on summons. In this the Court of Appeal considered he was wrong, and that under the circumstances he should have decided the question of law and not have put the parties to bring an action. As to the merits, the case turned upon the question, whether a bond given in 1867 by the deceased to the

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plaintiffs, as collateral security for part of a mortgage debt due to the plaintiffs by third parties, was barred by the Statute of Limitations (*See* R. S. O. c. 108, s. 23), the condition being that if the mortgagor paid the debt the bond should be void. The mortgagor had paid the interest up to December, 1877, after which it fell in arrear, and in 1880 the mortgagees went into possession. The obligor died in 1883 without having made any payment or given any acknowledgment. The Court of Appeal had no difficulty in deciding that the debt on the bond was not barred, and they placed their judgment both on the ground that although the principal debt was secured upon land, yet the debt on the bond was not so secured, and therefore the Real Property Limitation Act had no application, and in this respect they held that the case differed from the case of a covenant or collateral bond given by the mortgagor himself, as in *Sutton v. Sutton*, 22 Chy. D. 511, and *Fearnside v. Flint*, *Ib.* 579; and also on the ground that, even supposing that the statute did apply to bonds given by third parties, yet in this case the statute had not run because the mortgage was alive and the mortgagor still liable thereon, and that the part payments by the mortgagor had prevented the statute from running on the bond.

INFANT—BRITISH SUBJECT LIVING ABROAD—APPOINTMENT OF GUARDIAN BY ENGLISH COURT.

In *re Willoughby*, 30 Chy. D. 324, the Court of Appeal affirmed the order of Kay, J., appointing a guardian to an infant British subject resident abroad, and who had no property within the jurisdiction. The infant's mother was a Frenchwoman, and entitled by the law of France—where the infant resided—to the status of natural guardian of the infant; but she was not a person who would have been appointed guardian had she and the infant been domiciled in England, and she had brought proceedings in the French Courts for the appointment of guardians, which proceedings had been directed to stand over until it should be ascertained what course the English Courts would adopt. Under these circumstances it was considered proper to make the order, and although it was admitted by Cotton, L.J., that it is only under extraordinary circumstances that the Court would make an order where the infant is not within the jurisdiction, has no

property within the jurisdiction, and where the persons who have the custody of the infant are also out of the jurisdiction, yet he had no doubt of the jurisdiction of the Court to appoint a guardian to an infant British subject, under the circumstances existing in this case.

MORTGAGEES IN POSSESSION—ACCOUNT OF RENTS AND PROFITS.

*Noyes v. Pollock*, 30 Chy. D. 336, settles a question of practice in mortgage actions. The action was for redemption, and the usual accounts were directed to be taken against the defendants as mortgagees in possession. One Blood (who had since died) had acted as agent for the defendants in receiving the rents, and in their accounts the defendants merely credited the lump sums received by them from Blood, without showing what Blood himself had received from the tenants. On a motion for a better account Pearson, J., had held the account sufficient, and that the plaintiffs' proper course was to surcharge; but the Court of Appeal held that the defendants were bound to render an account showing what Blood had received, and that the death of Blood did not absolve them from this liability; and, moreover, that it was a question not of technicality but of substance, because the receipts of Blood were in fact as between the plaintiffs and defendants the receipts of the defendants, and without the knowledge derived from such an account the plaintiffs could not properly frame their surcharge.

EQUITABLE DEMAND—SUBJECT-MATTER UNDER £10.

In *Westbury v. Meredith*, 30 Chy. D. 387, the Court of Appeal held (affirming Kay, J.,) that when a claim to equitable relief is made, and the subject-matter of the action is below £10 in value, the High Court has no jurisdiction to entertain the claim. This case shows therefore that *Gilbert v. Braithwait*, 3 Chy. Ch. R. 413; *Westbrooke v. Browett*, 17 Gr. 339; and *Reynolds v. Coppin*, 19 Gr. 627, are still good law.

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## ONTARIO.

## DIVISION COURT—COUNTY OF NORFOLK.

McCULLY ET AL., Primary Creditors, v.  
ROSS ET AL., Primary Debtors, ROWLEY,  
Garnishee.

*Mechanics' lien—Garnishment—Priority.*

Ross & Co. contracted to build, for a fixed amount, a kitchen for R., and purchased materials for the work from L., and sublet the contract to other mechanics. He absconded without paying L. or the sub-contractors, before the contract was completed. R. took possession and adopted the work, such as it was, and admitted a debt due to R. & Co., which was garnished by McC. and P., under two D. C. attachments.

After the service of the garnishee summons, but within thirty days after furnishing the last of the material, L. and some of the workmen who did the work on the building filed their liens and took proceedings under R. S. O. cap. 120, and intervened in the garnishee suit, claiming to be entitled under their liens to the money in R.'s hands, and that the proceedings under that act gave them preference over the attachment.

Held, that the garnishee proceedings bound the debt as against the lien holders, and that the garnishors must be paid first out of the fund in the hands of R.

[Hughes, J.—St. Thomas, Dec. 12, 1885.]

This was a case in which a question arose under the garnishee clauses of the Division Courts Act, and the Mechanics' Lien Act, as to priority on the part of two garnishors, and as to preference on the part of certain claimants, who had supplied materials and labour to the primary debtors, who were contractors for the building of a kitchen as an addition to the house of the garnishee.

The facts of the case appear above and in the judgment of

HUGHES, Co. J.—An admitted balance is due by the garnishee to the primary debtors, the contractors, and he stands ready to pay \$79 as that balance. The balance he has not paid into Court, but holds it in his hands ready to pay over, on the decision and order of the Court being given, so that the contention forms an interesting interpleader between the garnishors and the claimants, under the provisions of the 144th section of the Division Courts Act.

It is unlike the case of *Lang v. Gibson*, 21 C. L. J., 74, cited in the argument, for reasons which will hereinafter appear.

Whatever may be the provisions of other statutes respecting the effect of garnishee proceedings, the clauses of the Division Courts Act for the attachment of debts are so clearly defined, and to my mind, so unqualified, that I have in view of de-

cisions delivered in garnishee proceedings in England, and decisions under the Statute of Frauds, to which I shall allude further on, no hesitation in saying that they fortify the opinion I gave at the trial of these cases, as to the respective rights of the garnishors and of the claimants to the balance in the hands of the garnishee.

I am not prepared to say what my decision would be, nor is it necessary for me to either draw or not to draw a distinction between these claimants and the primary debtors supposing the question arose in another form, as was the case in *Lang v. Gibson*. It is enough for me to consider this case upon its merits, and to decide it as the law applies to these parties circumstanced as they are. The case is not, as has been suggested, on all fours with *Lang v. Gibson*.

It is well understood that, whatever may be the right of a contractor, sub-contractors, labourers and material men, have to stand upon the contract between the owner and the contractor; and the owner is not obliged to pay any greater or other sum or amount than the price stipulated or agreed to be paid by the contract—their remedy is confined to money due to the principal contractor for the work which he agreed to do, but which the sub-contractor or mechanic has actually performed or for the materials which the contractor was to have furnished, but which the material-man supplied. It does not extend to money payable to the contractor on any other account; and for the labour so performed, and the materials so supplied, a lien may be acquired to the extent of the contract price. To that amount the lien is limited, and to the extent of any balance due by the owner to his contractors under the contract with him, they may recover and have the right to lien, but only on such balance; so that primarily, under our statutes, the extent to which the law has secured these claims [has been to give to the contractor a lien upon the premises for the entire work and materials expended by him, and to the sub-contractors, and labourers, and material-men, a lien to the extent that there may be funds in the hands of the owner and due to the contractor (see Philips on Mechanics' Liens, sec. 211, etc.) and no more.

It is urged for these claimants that their's are privileged claims—rights of priority over these garnishors, who are prior in point of time. This contention must have the direct sanction of statutory law, or none such exists; for there is no sanction under the common law for the contention of either of the parties in the question before me.

Do we find in any of the statutes affecting the rights of these parties a provision that the liens or



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preferences which they respectively claim shall supersede every other lien or encumbrance to the time when the work was commenced or materials furnished? I find none such, which will have the effect of giving preference over a garnishment served on the owner against the contractor, after the work was commenced, but before the filing and serving notice of lien.

It is laid down in Philips on Mechanics' Liens, sec. 249:—"If an act provides 'that the liens shall be preferred to every other lien or encumbrance which shall have attached upon the property, subsequent to the time when the work was commenced or materials furnished,' the lien of a sub-contractor takes precedence over a garnishment served on the owner against the head contractor, after the work was commenced, but before the filing and serving notice of lien. The lien of a mechanic does not, however, prevent an attachment as between creditors. The mechanic alone can assert his lien to defeat the attachment, and the amount of his lien being subsequently paid the surplus is bound by the attachment." This is all predicated on the hypothesis that the act creating mechanics' liens contains a provision such as neither of our Provincial Acts contemplates or furnishes. I find this point very much pressed and dwelt upon in argument in this case, that an attaching creditor can acquire no higher or better rights to the property or assets attached than the primary debtor had when the attachment took place, and that garnishment is a purely statutory proceeding, and cannot be pushed in its operation beyond the statutory authority under which it is resorted to. I fully assent to these propositions; but I find it clearly laid down on the other hand, to which I also assent, that "there is no distinction to be observed in the construction of statutes creating these liens and other expressions of legislative will" (see Philips on Mechanics' Liens, sec. 14), and again, "as acts in relation to mechanics' liens establish a system out of the course of the common law, when points arise evidently not foreseen by the legislature, and upon which the statutes have not spoken, the grounds of decision to be resorted to must be the general scope and spirit of the enactment. The analogy of cases, which have already been settled, and such considerations of policy as may be supposed to have had their influence on the minds of the law-makers, and to aim at such results as will most effectually promote the interest and security of those classes of men whom the system was designed to favour." . . . So where an injustice would result from the construction of an act it should not be adopted without the most explicit language. This is a conflict of creditors arising from

the preference afforded to two different classes of creditors under two several Acts of Parliament. Each seeks his own advantage to the exclusion of the others, and is a case not reached by the Creditors Relief Act, under which the policy of the legislature seems to favour a rateable division of the assets of a debtor amongst all his creditors, without priority or preference in certain cases. And with this conflict each of the two Acts of Parliament is set up as favouring the side of the contestants who have acted under the provisions of either.

Under the garnishee clauses of the Division Courts Act there is no provision for any other course than that of the exclusive benefit of the attaching creditor, to the extent of the debt claimed and the amount attached. Under the Mechanics' Lien Act there is no provision for creditors generally, but only for certain specified classes of creditors to the exclusion of such as have taken proceedings here under the garnishment clauses of the Division Courts Act.

In this case I find the 124th, 133rd, 137th and 138th sections of the Division Courts Act are quite as clear, absolute and positive as are those of the Mechanics' Lien Act, for the service of the summons in a garnishee proceeding has the effect not only of "attaching" (which means, in law, *taking, seizing, or distraining*) but also of "binding" in the hands of the garnishee ("subject to the rights of other parties" to whom I shall refer presently) the debt sought to be garnished from the time of such service until a final decision, made on the hearing of the summons; and any payment of such debt by the garnishee, during such period to any one other than the primary creditor or into Court, for satisfying his claim is declared, to the extent of such claim, to be void, etc., unless the judge otherwise orders. Thus we see that the debt is, as it were, tied up for the satisfaction of the claim of the garnishor, and kept under seizure until and unless the judge otherwise orders.

The subjecting the debt so garnished to the rights of other parties does not mean those creditors who are pursuing their remedies under other statutes, because the law does not favour a creditor adopting a multiplicity of remedies at the same time. If he chooses his remedy and his forum he is expected to confine himself to these, and not to indulge in every weapon within his reach. Section 142 provides a remedy for the rights of other parties who may be interested in the subject attached, although there may be judgment against the garnishee, or even if the money has been paid over by him, and then the parties may "be remitted to their original rights in respect thereto." This,

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I apprehend, may be held to apply to lien holders whose liens attach to the debt before the service of the process or to persons who hold a claim prior, in point of time, by assignment, but not to those who take proceedings subsequent to the garnishee proceedings and who seek for a lien, not upon the debt due by the garnishee, but upon his real property to the extent of all that he justly owes the primary debtor. The creditors who (like the claimants in this case) have taken proceedings under the Mechanics' Lien Act cannot "be remitted to their original rights" in respect of the debt attached, simply because that when these proceedings were taken they had no "rights" beyond that of being creditors, with the right to sue or take any remedy they chose. And it cannot be reasonably contended now that because they have taken their proceedings under the Mechanics' Lien Act that they can get in and frustrate or make ineffective prior proceedings which the garnishors have legally taken and are legitimately pursuing under another Act of Parliament. In my opinion neither the words in the parenthesis of the 137th section nor those of the 142nd section of the Division Courts Act apply to them.

It will thus be plainly seen that I do not agree in the opinion of His Honor Judge McDougall, as expressed in the case of *Lang v. Gibson*, 21 C. L. J., 74, nor do I see the application of the cases cited in his judgment, for reasons which I shall give further on.

In *Ex parte Foselyne*, 8 Ch. D., 327, it was held that the moment the order of attachment was served upon the garnishee, the property in the debt due from him was absolutely transferred from the judgment debtor to the judgment creditor; that the garnishee could then only pay his debt to the judgment creditor of his original debtor; that the property in the debt was transferred, and there was a complete and perfect security the moment the order for attachment was served. The judgment in this case overruled several previous decisions on this point.

I regard the Mechanics' Lien Act as affording a lien to the persons described therein, in respect of the subject of such lien, so as to make a charge upon the land to the extent of an unpaid account or demand against the lien holder for such materials or labour "upon any amount payable by the owner of the land under the lien, but not upon what the law may compel him to pay to some other attaching creditor."

The charge created is upon the money payable by the "owner" to the person entitled to the lien, and not upon the land, and the person entitled to the charge must first prove his right as against all other

rightful claimants and the right may be enforced by suit in default of payment by the owner of what he may justly owe the primary debtor. It is, in other words, another kind of attachment, and for enforcing payment by holding the land as security.

My view is strengthened by a reference to the broad provision of the 124th sec. of the Division Courts Act, which is introductory to the clauses relating to garnishee proceedings, for it says: "When any debt or money demand . . . is due and owing by any party to any other party . . . and any debt is due, or owing to the debtor from any other party; the party to whom such first mentioned debt is due and owing . . . may *attach and recover* in the manner herein provided any debt due or owing to his debtor from any other party . . . or sufficient thereof, to satisfy the claim of the primary creditor—subject to the rights of other parties to the debts owing from such garnishee." I do not see what could be broader or plainer in its language, or how a provision of law could be more absolute in its terms than this. A creditor may "attach and recover," and the debt is to be *attached and bound* until he recovers judgment, in order to satisfy, and to the extent unsatisfied on his judgment; and any payment by a garnishee into Court, or to the primary creditor, of the debts attached is declared to be a discharge to the extent of the debt owing from the garnishee to the primary debtor.

It was suggested on the argument that had the garnishee paid the money claimed here into Court, it would have been a bar to further proceedings; but that inasmuch as he did not pay it into Court, the remedy of the primary creditors has gone, and the subsequent proceedings under the Mechanics' Lien Act by other creditors cut out the claim of the primary creditors, and give it to the lien holders under the Mechanics' Lien Act; but that argument amounts to a mere play upon words—as if the provisions of a statute were to be subjected to defeat by those who seek to snatch an advantage to the prejudice of those who fairly and squarely bring themselves within its provisions. A payment of the money into Court may be made under the statute by a garnishee doing it at once after the attaching process is served, or upon the order of the Court after judgment is rendered, and the doing of that is declared by the statute to operate as, and to have the effect of, a discharge at law, to the extent of the debt owing, and the amount paid in; and once discharged the law is not so contradictory as to change it in favour of any one else: much less to *revive* it for the benefit of another creditor.

Had a provision such as is found in the Creditors'

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Relief Act, sec. 21, sub-secs. 3, 4, 5 and 6 (see Ontario Stat. of 1885, chap 15,) been embodied in the Mechanics' Lien Act, of course the case would have been different; but regarding, as I do, the garnishee clauses of the Division Court Act as for the benefit of any creditor who avails himself of its provisions, and the Mechanics' Lien Act as one which exists for a particular class of creditors, to the exclusion of all others, I must hold that each class or set of creditors is entitled in the fullest extent to the advantage of remedies afforded by the several statutes whilst they exist. Whilst the legislature leaves the statute law of the Province giving these preferences and advantages, there is no injustice in according and applying the remedies which creditors pursue in order to get their just dues.

The words employed in the C. L. P. Act with regard to the effect of an attaching order are (see section 308) "service upon him" (the garnishee) of an order that debts due to the judgment debtor shall be attached, and shall "bind" such debts in his hands. The word "bind" here, as explained in note (n) to Harrison's C. L. P. Act, has received the same construction as the same word used in the Statute of Frauds, 29 Car. II., cap 3. As under the Statute of Frauds the goods are bound in the hands of the sheriff, so under this section the debt is bound in the hands of the garnishee: *Holmes v. Tutton*, 5 E. & B. 80; *Turner v. Jones*, 1 H. & N. 878; *Tilbury v. Brown*, 30 L. J. Q. B. 46; *Sweetman v. Lemon*, 13 U. C. C. P. 534; *Tate v. The Corporation of Toronto*, 10 U. C. L. J. 66, 3 Prac. Rep. 181.

Under these authorities the word "bind" has been interpreted to mean "that the debtor or those claiming under him shall not have power to convey or do any act as against the right of the party in whose favour the debt is bound, and as not giving any property in the debt in the nature of a mortgage or lien but a mere right to have the security enforced." I regard the case, *Ex parte Greenway*, in *re Adams*, L. R. 16 Eq. Ca. 619, like others of the previous decisions, as overruled by the more recent case of *Ex parte Foselyne*, to which I have before referred. Had it not been overruled I should have looked upon it as only one of construction under the peculiar provisions of the English Bankruptcy Act, 1869, and unlike the present case the debt was not seized under the process of the Tolzey County Court, under the English County Court Attachment Act, until several months after the property of the judgment debtor had vested in a trustee under the Bankruptcy Act, and I cannot see how it could be held to apply to the circumstances or the law of the cases before me.

*Ex parte Pillers*, L. R. 17 Chan. Div., was in like manner a case of construction under the same Bankruptcy Act, 1869; and as to whether or not the title of a trustee under the act related back so as to defeat the attachment under the garnishee clauses of the English County Court Act, and whether or not by virtue of the adjudication of bankruptcy, and the relation back of the trustees' title, all the property which the bankrupt had at the time he committed the act of bankruptcy was vested in the trustee, and became divisible among the creditors generally. It was adjudged that the debt had ceased to be due to the bankrupt, who was the primary debtor, and had become due to the trustee and, therefore, that the garnishee process could not bind the debt.

There is but little analogy between the attaching of the property of an absconding debtor, and the garnishment of debts, because the respective statutory provisions under which the proceedings are taken are different, for the one is essentially a process in the nature of a distress or sequestration of property, in order to secure the appearance of an absent debtor, and to hold his estate subject to the payment of his debts, and for the benefit of his creditors, who may bring suits within a prescribed limit of time, and it does not always follow that such an attaching creditor secures anything of the proceeds. The other attachment is in the nature of a proceeding *in rem*, which attaches and binds a debt for the payment of whatever creditor adopts it, to the extent of the indebtedness of the garnishee. By this latter garnishment the creditor obtains an effectual attachment of the debt due by the garnishee, and its effect is to prevent the garnishee from paying his debt to the primary debtor. These attachments (where there are more than one) take precedence in the order of their service, and a payment into Court, either before or after judgment against the garnishee, is a complete discharge of the debt due to the primary debtors; and a payment into Court, when the law authorizes the Court to require the garnishee to pay the money in, will be, and must be regarded in legal effect, the same as a payment under execution. (See *Ohio, etc., R. W. Co. v. Alvey*, 43 Indiana 180, *Turnbull v. Robertson*, 38 L. T. N. S. 389; *Wood v. Dunn*, L. R. 2 Q. B. 73, *Culverhouse v. Wickens*, L. R. 3 C. P. 295; *Drake on Attachment* sec. 244.)

I do not think it necessary to further extend my remarks upon these cases, beyond saying that I do not consider that this decision will have the effect of pushing the operation of the statute, under which these garnishors are proceeding, beyond the statutory authority under which they claim their priority, and payment of their respective debts.

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[Chan. Div.

from the garnishee, and, as the claimants who set up the liens under the Mechanics' Lien Act are invoking a merely statutory authority, they have no right in my opinion, to set up that the statute under which they act gives them a superior right to the garnishors, in the absence of any provision of law entitling them to the precedence which they claim.

I, therefore, under the powers conferred upon me by sec. 144 of the Division Courts Act, and the general provisions affecting the question before me, decide and adjudge that the debt due by the garnishee is subject to payment of the respective debts of the primary creditors, Robert McCully and John Patterson, because nothing but the order of the Court can undo the effect of the service of the garnishee summonses: (see O'Brien's D. C. Manual 131, note (e)).

I do not see that *King v. Alford*, 9 O. R. 643, cited by Mr. Farley, in any way affects the question in controversy between these parties.

I therefore order Charles Rowley, the garnishee, to pay into Court, and there will be judgment recorded against him for the sum, due by him to the primary debtors, David Ross and Peter Ross, of \$79.

That the Clerk do pay the claim of the garnishor, Robert McCully, the debt due by the primary debtors, amounting to the sum of \$21 00  
Costs of suit ..... 3 02

\$24.02

And to the garnishor, John Patterson, his debt of ..... \$18 20  
Costs of suit ..... 3 02

\$21 22

Total..... \$45 24

Which leaves a balance of..... \$33 76  
to be divided ratably amongst the other creditors under the Mechanics' Lien Act as follows, viz.

To Henry Lindop cr. \$30 46 ..... \$18 99

James Stewart " 19 44 ..... 12 12

Mark Bowley " 2 65 ..... 2 65

Total..... \$33 76

And I further order, that upon each of the said Henry Lindop, James Stewart and Mark Bowley, executing and filing with the Clerk, a full discharge of the said liens, ready for registry, that the said sums be respectively paid them, as in full of their said liens.

## NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

### CHANCERY DIVISION.

Divisional Court.]

[Dec. 3, 1885.

FERGUSON V. WINSOR.

*Vendor and purchaser—Mistake—Sale by plan—Representation—Notice.*

The judgment of O'CONNOR, J., reversed.

*Per* BOYD, C.—The evidence in this case does not come up to the standard laid down in *Dominion Loan Society v. Darling*, 5 A. R. 577, by Moss, C.J., that "it must be demonstrated what the true terms of the bargain were, and that by mutual mistake they were not incorporated in the writing. The proof must be clear, satisfactory and conclusive."

The defendant bought lot 7 as contained in S.'s mortgage, and obtained a deed from the executors according to a registered plan which is to be treated as incorporated therewith, and he is even, as against his representation to the plaintiff that the piece in dispute was a portion of the property she was in treaty for and subsequently purchased, entitled to claim the benefit of Gordon's position as purchaser and registered owner for value.

*Per* PROUDFOOT, J.—Even if the representation were proved, the plaintiff owned no property at the time it was made to be affected by it, and such an expression of opinion should not estop him from purchasing lot 7 eighteen months afterwards. The purchasers at the auction sale got a better bargain than they thought they had made, but they had no knowledge of any right to be interfered with had they chosen to assert their title to the whole lot, this raises no equity against them in the plaintiff's favour.

Even if the defendant had notice of the plaintiff's equity, he is entitled to claim the benefit of the want of notice of the purchasers at the auction sale.

*Lash*, Q.C., for the appeal.

*Moss*, Q.C., contra.

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

Ferguson, J.]

[January 12.]

## IMPERIAL BANK V. METCALFE.

*Vendor and purchaser—Conditions of sale—Time for objections—Statute of Uses—Discharge of mortgage.*

Appeal from the Master's report.

When on a sale of lands the contract provided that the purchaser should be allowed ten days to make requisitions on title, and the purchaser made certain objections within the ten days, and the answers not being satisfactory refused to complete, whereupon the vendor sued for specific performance and obtained the usual judgment.

*Held*, that the purchaser could not raise in the Master's office fresh objections not raised within the ten days mentioned in the contract.

Certain owners of the equity of redemption in lands by deed granted the same to "A., his heirs and assigns, to have and to hold the same to A., his heirs and assigns, unto, and to the use of B., his heirs and assigns." This was dated July 17th, 1875, and registered July 21st, 1875.

*Held*, that whether this deed operated under the Statute of Uses or not, B. took under it the beneficial interest in fee, and it had the same effect as if it were a conveyance to A. upon trust for the benefit of B.

The equity of redemption in the said deed conveyed was subject to two mortgages—the M. mortgage and the S. mortgage. The discharge of the M. mortgage was registered on July 21st, 1875, the same day as the deed.

*Held*, that the deed must be assumed to have been delivered before the day it was registered, and the discharge of the M. mortgage on registration operated as a re-conveyance to B., who was the assignee of the mortgagor within the meaning of the statute respecting the effect of registering a discharge of a mortgage.

*MacLennan, Q.C.*, and *Galt*, for the appellant.  
*Bain, Q.C.*, and *Masten*, for the respondents.

Cameron, C.J., C.P.]

[February 1.]

## INGALLS V. McLAURIN.

*Mortgagor and mortgagee—Collusive sale—Fraud—Right to redeem.*

Action for redemption.

The defendant, being mortgagee of certain lands, advertised them for sale under the power of sale, and employed one M. to buy them in for him, and M. bought them in in his own name, but forthwith conveyed them to the defendant. The defendant, being advised that the sale was bad owing to defects in the mode of exercising the power, went to J., the mortgagor, and bargained with him for the purchase of his wife's dower, which was not barred in the mortgage, and of two adjoining lots for \$700. A deed was accordingly prepared and signed, J. joining therein under a mistaken idea that he was doing so merely for conformity, and that the defendant already had a good title to the equity of redemption under the mortgage sale. This deed was sent to J.'s solicitors, who advised him as to his legal position, and retained the deed in their hands, while J. brought this action for redemption.

*Held*, that the plaintiff should be allowed to redeem.

Though it may be that a mortgagee is not, strictly speaking, a trustee for the mortgagor, but is entitled to enforce his security for his own benefit to satisfy the mortgage money, the right of the mortgagor to redeem is a very pronounced and decided right and one that he cannot be deprived of by any dealing between him and the mortgagee that is not carried out in a full spirit of fairness without undue pressure, influence, or concealment of anything of which he should be informed by the mortgagee.

*J. R. Roaf*, for the plaintiff.

*W. Nesbitt*, and *A. R. Lewis*, for the defendant.

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

## PRACTICE.

Boyd, C.] [December 15, 1884.

## YEMEN V. JOHNSTON.

*Money in Court—Assignment—Solicitor's lien—Priority—Salvage money.*

The fact that an assignment was made by the defendant to a creditor of a portion of a fund in Court, as to which litigation was pending between the defendant and plaintiff (mortgagor and mortgagee) as to the amount to which each was entitled, and which, therefore, involved the incurring of costs before the amount could be apportioned, imposed upon the assignee the necessity of submitting to all just and proper deductions for the charges of the solicitors by whose exertions the portion of the fund payable to the defendant was ascertained. To the extent to which the defendant's solicitors incurred costs in resisting and prevailing against the account brought in on behalf of the plaintiff, to that extent their lien should precede the claim of the assignee. Such costs are in the nature of salvage money, and are always entitled to meritorious consideration.

*Shepley, for the solicitors.**Holman, for the assignee.*

Ferguson, J.] [Dec. 8, 1885.

## DUFRESNE V. DUFRESNE ET AL.

*Sale at undervalue—Purchase for value without notice—Advance by wife to husband without any contract for repayment.*

L. F. D. being the owner of certain valuable property mortgaged it for \$700, became of unsound mind and was confined in an asylum. During his confinement M. A. D., his second wife, procured S., the holder of the mortgage, to sell under the power of sale, and it was sold for \$900 to E. R., the sister of M. A. D. Two years after E. R. sold the property to M. E. B. for \$5,000, and a mortgage for \$4,000 repaid purchase money was taken to M. A. D.

In an action by L. F. D. by L. D., his next friend, to set aside the sale, or for an account, it was

*Held*, on the evidence, that the property was sold at a great undervalue under the power of

sale, and that E. R. was the agent of M. A. D., but that as M. E. B. was a purchaser for value without notice the sale must stand, but an account of the proceeds was ordered against M. A. D.

During the trial M. A. D. obtained leave to amend, and claimed to be allowed a sum of \$1,500 which she alleged she had given to her husband the plaintiff as a loan, and which was employed in the purchase of the property and building thereon.

*Held*, that as no contract for repayment was shown, no security being taken, and no attempt having been made to collect the amount, although many years had passed, it was not a loan and the wife could not recover it.

*W. H. Barry and Sinclair, for the plaintiff.**Lees, Q.C., for the defendants Mary Ann Dufresne and Eliza Ross.**Oliver, for the defendants the Benois.**O'Gara, Q.C., for the defendants the Société.*

Boyd, C.]

[Dec. 23, 1885.

## BLEAU V. BLEAU.

*Vendor and purchaser—Sale of infant's estate—Title—12 Vict. c. 72—R. S. O. c. 40, s. 76.*

Certain infant's lands were sold under an order which appeared upon its face to have been presented under the statutable jurisdiction of the Court of Chancery relating to the sale of infants' estates, 12 Vict. c. 72; R. S. O. c. 40, s. 76. The petition and order were entitled in the matter of the infants, and the subsequent proceedings were taken as provided by the general orders of the Court, the order for sale set out that what was being done was because it was beneficial to the infants, and the conveyance was executed by the Referee for the infants.

*Held*, that the Court would never allow the infants to recede from what was so done for their benefit, and that a subsequent purchaser cannot conjure up doubts as to jurisdiction when upon the face of the proceedings the statute authorizing the sale appears to have been followed. *Calvert v. Godfrey*, 6 Beav. 97, considered and distinguished.

*R. M. Meredith, for the purchaser.**H. Becher, for the vendor.*

## Prac.]

## NOTES OF CANADIAN CASES—CORRESPONDENCE.

Proudfoot, J.]

[February 3.]

## CANADIAN PACIFIC RY. CO. V. MANION.

*Changing place of trial—Ejectment—Rule 254 O. J. A.—R. S. O. ch. 51, sec. 23.*

In an action of ejectment the place of trial may be changed by order of a judge. If the power is not given by Rule 254 O. J. A., it is not taken away by that rule, and it is given by R. S. O. ch. 51, sec. 23.

*Arnoldi*, for the plaintiffs.

*W. H. P. Clement*, for the defendants.

Mr. Dalton, Q.C.]

[February 11.]

## ONTARIO BANK V. REVELL.

*Interpleader—Sale of goods—Payment into Court—Gross proceeds.*

Where an interpleader order directs the sheriff to sell the goods seized and pay the proceeds into Court, it should provide that the whole proceeds be paid in without deducting the sheriff's expenses of sale or possession money.

*Langton*, for the sheriff.

*McDougall* and *Holman*, for claimants.

*Leeming*, for the execution creditors.

## CORRESPONDENCE.

**INSOLVENT ACT OF 1875, SEC. 125—IS IT ULTRA VIRES!—CONFLICTING DECISIONS IN DIFFERENT PROVINCES.**

*To the Editor of the LAW JOURNAL:*

SIR,—Controversies as to the respective powers of the Dominion Parliament and Local Legislatures are in no cases more important than where they arise under the Insolvent Act of 1875. True, this statute has been repealed, but there doubtless yet remain many estates to be settled under it, calling for the application of different sections of the Act.

A very important section is 125, purporting to compel a resort to the Insolvent Court or Judge by summary petition for the enforcement of "any debt, privilege, mortgage, hypothec, lien, or right of property in the hands, possession, or custody of an assignee," and to preclude "any suit, attachment, opposition, seizure, or other proceedings of any kind whatever"; a provision which, if not *ultra vires*, is a most salutary and necessary one, and will be sure to find a place in any Insolvent Act that may hereafter be enacted. I desire to call the attention of the profession to the conflict of decisions respecting this provision in the several Provinces. In *Crombie v. Jackson*, 34 U. C. Q. B. 575, it appears that Judge, now Chief Justice' Wilson, of Ontario, held section 125 valid, on the ground that the same provision existed "in the Insolvent Act of the old Province of Canada, and that the British Parliament, in enacting the B. N. A. Act, must be presumed to have taken notice of the then existing laws of the Provinces. I cite from Clark on Insolvency, p. 294. But the Maritime Provinces had no Insolvent Act prior to Confederation; and if there is no better reason for upholding the section than the one ascribed to the eminent Chief Justice, it would seem to follow that portions of what ought to be and was certainly meant by its framers to be a uniform insolvent law for the whole Dominion would be in force in some Provinces and not in others. In New Brunswick, where, previous to Confederation, as I observed, no insolvent law existed, the corresponding section in the Canadian Act of 1869 was held valid in the case of *McQuirk v. McLeod*, 2 Pugs. 323, so that the holder of a bill of sale, by way of mortgage of chattels, could not maintain replevin against the assignee in insolvency who had taken the goods. But in the case of *Pineo v. Gavasa et al.*, in the Supreme Court of Nova Scotia, a diametrically opposite conclusion was arrived at. There the plaintiff, a creditor of the insolvent, shortly before his insolvency, agreed to lend him an additional \$50 on his giving him a chattel mortgage to secure him the aggregate amount of his past and this newly created indebtedness. The goods mortgaged coming into the hands of the assignee, with other property in possession of the insolvent, the plaintiff brought replevin for them in the County Court. Like the case of *McQuirk v. McLeod*, it was not a question of the simple ownership of property as between the insolvent and a third party who, not being a creditor, could not file a claim; nor was it a case of a mortgage on real estate, which the Insolvent Court has not the machinery to effectually deal with. Assuming that, in the absence of actual fraud at common law or under the statutes of Elizabeth

## CORRESPONDENCE.

the plaintiff ought to have been recouped from the estate, the \$50 loaned to the insolvent when the chattel mortgage was taken, just as a mortgage for a present *bona fide* advance would be good, it is evident that no adjustment of any such equitable claim could be made in an action of replevin. The County Court held, as was held in *McQuirk v. McLeod*, that the plaintiff was driven to his remedy under sec. 125, and therefore, that the action must fail; but the Judge went on further to find on the evidence that the chattel mortgage was made in contemplation of insolvency, and therefore, so far as it purported to secure a pre-existing debt, it was void as an unjust preference; thus deciding for the defendant under both sections, 125 and 133. On appeal to the Supreme Court of Nova Scotia, this judgment was set aside, the decision being pronounced by the Honourable the present Minister of Justice (whose opinion has become, from his new position, a matter of practical legislative importance,) as follows:

THOMPSON, J.—"The learned judge below decided this case on the principle that sec. 125 of the Insolvent Act of 1869 prevents all actions being brought against a person who is an assignee of an insolvent for anything done as assignee, and compels all persons who seek redress against him to resort to the Judge of Insolvency. Sec. 125 has, however, no such general application. The Dominion Parliament, probably, had no power to enact that every one who has a cause of action against a certain class of persons must resort to a certain tribunal, and that all other Courts must be closed against him, as was suggested by Wilson, C. J. (then Wilson, J.) in *Crombie v. Jackson*, 34 U. C. 575. I think that Parliament never intended that by sec. 125. For the performance of those duties which arise from the Insolvent Act, and for the enforcement of those rights which are created by that Act, the remedy is that pointed out in sec. 125 as, for instance, in relation to the manner in which the assignee shall administer the estate and pay dividends, the resort must be to the Judge of Insolvency, in order to prevent the estate from being consumed in litigation, and to accomplish speedy justice. When, however, the assignee does that which the law does not authorize him to do, in relation, for example, to a person who has not filed a claim, and is, therefore, not a creditor within the meaning of the Insolvent Act, even though that person be a creditor of the insolvent in the ordinary acceptance of the term, or has property of the insolvent under lien, section 125 does not interfere with the jurisdiction of the ordinary tribunals. In this case, therefore, that section did not prevent the plaintiff, who held a bill of sale on the

property of the insolvent, from enforcing that bill of sale, or from holding the property until the security was paid off. The assignee took all that the insolvent could give him, but that was only an equity of redemption in the goods, unless the bill of sale was fraudulent, in which case the assignee also had in him the rights of creditors as well. The matter of fraud, then, had to be tried irrespective of sec. 125. This was the decision of Ritchie, E.J., in *Tucker v. Creighton*, N. S. Eq. Rep. 261, and has been held in the various cases there referred to as well as in others—for example, *Burke v. McWhirter* 35 N. C. As to the question of fraud, there is in the case some evidence which would be allowed to go to a jury as evidence of fraud. If the learned judge had found that evidence sufficient, we should have had to decide whether it was so in our opinion in view of what the insolvent and the plaintiff say on the subject, but the judge has not so found. He has felt controlled by section 125 and, so far from concluding that the bill of sale was wholly fraudulent, he intimates that he thinks it may be good to the extent of \$50. If good to that extent the plaintiff must recover, and as the case went off below on the first point we think that justice will be best served by simply allowing the appeal with costs, and sending the case back to be tried anew."

There was no dictum in the judgment below that the section applied to "all actions" against an assignee for "anything done as assignee," and if there were, the application of the section to the particular case, or cases of the same class, was all that was in controversy. The oral decision of the judge below was reported in the following words: "I gave judgment for defendant on the ground that the action would not lie in face of section 125 of the Insolvent Act, and because I find the bill of sale was made in contemplation of insolvency, and adjudge it an undue preference contrary to the policy of the Insolvent Act; although I intimated that in the administration of the estate the plaintiff might, perhaps, successfully claim a lien on the proceeds of the goods in question to the extent of any money lent at the time the bill of sale was executed—say the \$50 if so loaned at that time—but not for the antecedent debt; as that would be giving him an undue preference over other creditors."

*Tucker v. Creighton*, ante, was a case of real estate; and in *Burke v. McWhirter* it would seem that the claimant of the goods was not a creditor at all; it was a mere case of disputed ownership.

In view of these conflicting decisions by Courts and judges of high authority, I would suggest the urgent necessity of such legislation as will tend to more fully secure uniformity in the administration



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and application of statutes of the Dominion Parliament. To this end an amendment to the Supreme Court Act will be necessary, giving to the Supreme Court an appeal from any case originating in any inferior Court, when the decision has turned on the validity or construction of any enactment of Parliament, whether the question has been raised by the pleadings or not; or at least such an appeal in any case, wherever originating, if the cardinal point for its determination involves the validity, construction or application of any such enactment relating to insolvency. Or if, as probably is the case, the leading Nova Scotian decision is the correct one, an amendment to the B. N. A. Act ought to be sought by which Parliament may acquire the power to legislate in respect to rights, liabilities and jurisdictions arising out of insolvency as the terms of section 125 purport to do. If one section of the Insolvent Act is to be rescinded or curtailed in its operation as clashing with the powers of the Local Legislatures over property and civil rights, or the establishment of Courts, it is easy to point out many others which will require to be similarly treated for the same reason; so that while parliament may enact the shell of an insolvent law the inconvenient necessity will remain of invoking the Local Legislatures to supply the kernel. Meanwhile I invite discussion of the conflicting doctrines of the three cases referred to, and trust that some of the able writers on the B. N. A. Act will favour the profession with their views.

Nova Scotia, Nov. 9, 1885. Yours etc., LEX.

[The above communication suggests two questions for discussion:—(1) The propriety of the decision of Thompson, J. (now Minister of Justice), in *Pineo v. Gavasa*, and (2) The right of appeal from inferior Courts to the Supreme Court in cases involving the constitutionality of Acts of the Dominion or the Provinces.

1. As to the first point we say that if the judgment of Thompson, J., was delivered while the Insolvent Act was in force, it would seem to conflict with the Ontario cases cited in his judgment, and also with cases under the English bankruptcy law. See *Ex parte Cohen*, L. R., 7 Ch 20; *Ex parte Baum*, L. R., 9 Ch. 673; *Ex parte Lopez*, 5 Ch. D. 65. *Dumble v. White*, 32 U. C. Q. B. 601. *Crombie v. Jackson*, 34 U. C. Q. B. 579, and *Burke v. McWhirter*, 35 U. C. Q. B. 1, decided that all creditors of an insolvent after the appointment of an assignee in insolvency, whether holding liens or securities on such insolvent's property or not, must enforce their legal rights through the Insolvent Court, and that under s. 50 of the Insolvent Act of

1869 they could not bring independent suits in other tribunals to enforce their claims as creditors or their specific liens on the insolvent's property. It was further held in *Crombie v. Jackson* that the 50th section of the Act was not *ultra vires*, nor an interference with legislative authority of the Provinces in regard to property and civil rights in the Provinces, nor in establishing Provincial Courts for the administration of justice; and further that the Dominion Parliament had authority to legislate respecting property and civil rights in so far as the same were affected by Acts relating to bankruptcy and insolvency—a decision since abundantly sustained by the judgments of the Supreme Court and Judicial Committee of the Privy Council, and notably by the Judicial Committee in *The Citizens' Insurance Company v. Parsons*, 7 App. Cas. 96.

But if the judgment in *Pineo v. Gavasa* has been rendered since the repeal of the Insolvent Act by 43 Vic. c. 1 (D.), it may be a question whether the absolute prohibition from litigating in other Courts applies, seeing that the saving proviso in the latter Act does not in express words refer to "creditors and the enforcement of their rights or liens in respect of such insolvent's estate." The judgment of Thompson, J., does not touch that ground; but though the reasons given by him may not be sound, the result of his judgment nevertheless may be found to be good law. As to the partial validity of the mortgage we would refer to *Totten v. Douglas*, 15 Gr. 126, 18 Gr. 341, and the cases there cited.

2. We endorse the remarks of our valued correspondent as to the right of appeal to the Supreme Court as respects the validity of Acts of the Dominion and Provinces. A general provision authorizing such appeals will be found in ss. 54 to 57 of 38 Vict. c. 11 (D.), as amended by 39 Vict. c. 26, s. 17 (D.), and which was accepted by Ontario by R. S. O. c. 38. And in 1881 the Legislature of Ontario by 44 Vict. c. 27, s. 17, authorized the Attorney-General to appeal to the Court of Appeal in cases arising under the summary jurisdiction of the Courts to quash convictions by justices of the peace under the Liquor License Acts, whenever the Attorney-General certified "that in his opinion the point in dispute is of sufficient importance to justify the case being appealed;" and under which power *Reg. v. Hodge* and *Reg. v. Frawley* reached the Court of Appeal (7 App. R. 246), and the former the Judicial Committee (9 App. Cas. 117). Similar provisions in the laws of Nova Scotia would enable litigants in that Province to test the validity of the laws of the Dominion and the Province by the same or a similar process of appeal.—Ed. L. J.]

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## DIARY FOR MARCH.

2. Tues...Sittings of Court of Appeal, and Sittings C. C. of York for trials begin.  
3. Fri.....Holt, C. J., died 1710, æt. 68.  
4. Sat.....Lord Chan. Hardwicke died 1764, æt. 74.  
5. Sun.....Quinquagesima Sunday.  
6. Wed.....Ash Wednesday. First day of Lent.  
7. Sat.....Lord Mansfield born, 1704.  
14. Sun.....1st Sunday in Lent.

TORONTO, MARCH 1, 1886.

WE publish a letter in another place in reference to the recent Bar dinner. It needs no comment. We have not the pleasure of knowing the writer, but assume he is correct in saying that the article referred to was not read to the meeting which undertook to criticise its language. Our correspondent writes over his own signature in a manly, straightforward manner, and with a proper sense of what the profession owes to its own dignity.

WE have seen no reason to retract or alter anything we said in reference to the dinner. We simply expressed the views which later enquiry would seem to shew to be those of all whose opinion is of most value in matters professional. Doubtless the members of the Osgoode Legal and Literary Society have by this time fervently ejaculated, "Save us from our friends." On its behalf we protest against the "fiery resolution" which was no doubt intended to put an end to our existence; but which has, we think, in the public opinion of the profession, consumed those men who proposed and carried it. Those who passed it thereby said, "the cap fits," and promptly put it on. For our own part we expressly

said the Society's dinner of last year was not marred by such unseemly exhibitions as were noticed on the last occasion, and we do not believe and never said that its members were in any way, as a body or otherwise, responsible for them this year. As to the American Bar it is very well able to take care of itself. We know that there are many men of high feeling amongst its members, who would not have relished the "joke" of their representative, to which we referred, any more than we did. We feel sure that if our remarks, and not an incorrect summary of them, had been read at the meeting of the Society, that unhappy and most inapt resolution would have been laughed out of Court.

THE Benchers of the Law Society would act wisely if they referred to Imperial Acts of Parliament before drawing up rules, especially any affecting Irish solicitors, or they will get the credit of sympathizing with the extremest type of Irish Home Rulers, by ignoring *in toto* the legislation of the Imperial Parliament for Ireland. In the new rules of 1885, providing for the admission of solicitors in "special cases" (published on p. 42 of the *Law Journal*), they allow "an attorney and solicitor in the Courts of Chancery, Queen's Bench, Common Pleas, or Exchequer, in Ireland," to apply for permission to practise in Ontario; thus virtually repealing or ignoring (as do Home Rulers) the Imperial Act of 1877, 40 & 41 Vict. c. 57, which abolished these Irish "Four Courts," and declared that thereafter they should be consolidated into one "Supreme Court of Judicature"; and which also abolished the title "attorney" and substituted for it

## OUR ENGLISH LETTER.

the more appropriate title of "solicitor." We trust we may assume that the Benchers of the Law Society of Ontario did not, by their ignoring Imperial legislation, intend to show their political leanings towards a policy which Lord Salisbury declares is a menace towards the "dismemberment of the Empire."

## OUR ENGLISH LETTER.

ANOTHER change of Government has produced great excitement at the Bar, since a shuffling of the Cabinet cards involves not only a redistribution of honours, but also a diffusion of work. Sir Farrer Herschel is Lord Chancellor; in other words, business to the extent of £15,000 a year, or thereabouts, is cast loose. Some of it will go, no doubt, to those modest-looking chambers in Pump Court, where the late Attorney-General, Sir Richard Webster, carries on a tremendous practice. But it is doubtful whether this great lawyer can take in more business; he can only increase his fees. Then Mr. Charles Russell, Q.C., and Mr. Horace Davey, Q.C., have become respectively Attorney and Solicitor-General, which means, of course, that neither of them can manage to keep the whole of their private practice so long as Mr. Gladstone's Government endureth. One begins to look round among the Queen's Counsel to see who the coming men are. Honours appear to be about equally divided between Mr. Murphy, Q.C., Mr. Lockwood, Q.C., and Mr. Crump, Q.C. They are men of different types. Mr. Murphy is of the gently-humorous Irish type of advocate; a sound lawyer and an admirable man with a jury. Mr. Lockwood, who is something of a wit, with a failing for caricature. As one listens to one of his boisterous, but incisive speeches, it is impossible to forget those

exquisitely funny sketches which he produces during his leisure moments in Court; and the next thought which suggests itself is that this is a Yorkshireman pure and simple. The latter impression is peculiarly strong when Mr. Lockwood cross-examines a reluctant witness; for there is no cross-examining counsel so crafty or so successful. Mr. Crump has been described in your columns before.

Meanwhile, let me turn for a moment to the admirable almanac which has recently arrived from the CANADA LAW JOURNAL. Politics have rendered it inaccurate as regards the English Judiciary. For Lord Halsbury insert Baron Herschel; for Sir Richard Webster, Q.C., insert Sir Charles Russell, Q.C.; and in the blank place left for the Solicitor-General let the name of Sir Horace Davey, Q.C., appear. Also, as regards the judges of the Queen's Bench Division, Sir John Eldon Gorst did not accept the vacancy created by the elevation of Sir Henry Lopes to the Court of Appeal, and the change which has been made will be best indicated by saying that it will be a futile enterprise for any Canadian firm to send a Privy Council brief to him who was Mr. Grantham, Q.C., since that gentleman has changed his silk gown for a red one with an ermine tippet.

Were it not that the Divorce Court during the trial of a *cause célèbre* is the most intolerable place on this earth, your correspondent would at this moment be listening to the argument in *Crawford v. Dilke*. But the discomfort of being packed like a herring in a barrel is too much to be counterbalanced by the pleasure of hearing a statesman's character ripped up before a bevy of fair and titled spectators. Nor is the business of the Divorce Court a savoury one at the best of times; and perhaps it is hardly creditable to English ladies that on an occasion of this sort the President of the Probate, Divorce and Admiralty Division should be inundated

## OUR ENGLISH LETTER—MECHANICS' LIENS.

with petitions for reserved seats. Still the fact remains that he is so inundated, and that the petitioners are for the most part ladies of high degree who do not hesitate to show in the most public manner their keen love for scandal. I am informed, however, on good authority, that the case is not likely to last long, that the arguments for the petitioner are likely to fail by their inherent weakness, and *mesdames et mes demoiselles* are highly likely to endure a bitter disappointment.

Of the legal topics of the day the prevailing and the most interesting are the law in relation to riots and in relation to bills of sale. As every one in Canada must ere this have been well aware, Monday, the 8th of February, was a memorable day in the history of London. For several hours the mob was in undisputed possession of the richest streets in the West End, and an enormous amount of damage was done. In everybody's mouth is the question, whether or not the hundred is liable for the damage, and the answer is that according to the present state of the law the shopkeepers must make good their own losses. For one thing the Riot Act was not read; therefore the rioters, *qua* rioters, were guilty, not of a felony, but of a misdemeanour. This, however, would not exclude the shopkeepers from their remedy if the demolition of their houses had been felonious. But for some inscrutable reason the Court of Appeal has chosen to say, in connection with an election riot at Great Marlow, that partial demolition is not *per se* felonious, unless the rioters had a defined intention of completing the demolition unless they were interrupted. Whether this decision, which is a well-known one, would be reversed if the shopkeepers had recourse to that Supreme Appellate tribunal known as the House of Lords, is more than one can venture to say. But it is at least open to argument that the sound common-sense

view of the question is that where through the gross and culpable neglect of the civil authority rioters are enabled to inflict terrible loss upon the trading community, it is grossly unfair that the trading community should bear the entire consequences.

With regard to bills of sale there is an appalling strictness in the decisions of the Court of Appeal. It has been laid down that the smallest material deviation from the form given in the schedule to the Bills of Sale Act, 1882, shall be fatal; and amongst other things the forms prescribed by most of the leading text-books have been held to be hopelessly bad. The net result is a panic among the money-lenders which delights the rest of the world, since these gentry are, to quote the words of that eccentric genius, Mr. Commissioner Kerr, the curse of the country. For the rest there are no complaints, except that perennial one, "the judges are away on circuit, and business is almost at a standstill."

Temple, February 13.

## MECHANICS' LIENS.

[COMMUNICATED.]

THE cases of *Lang v. Gibson*, 21 C. L. J. 74, and *McCully v. Ross*, *ante* p. 63, are conflicting decisions upon a point of Mechanics' Lien law of some importance. In both cases, after sub-contractors had acquired liens under the Mechanics' Lien Act, an execution creditor of the contractor under whom these sub-contractors claimed, applied for and obtained an attaching order against the owner in respect of the moneys due by him to the contractor before the liens were registered, or any suit brought to enforce them. In neither case, however, had the time for registering the liens, or bringing suit to

## MECHANICS' LIENS.

enforce them, expired when the attaching order was obtained. In the former case Macdougall, Co. J., York, held the lien-holders were entitled to priority over the attaching creditor, but in the latter case Hughes, Co. J., Elgin, held that they were not.

The point in question is by no means free from difficulty; and the difficulty arises from the wording of the section of the Act conferring the right of lien. The third section of the Mechanics' Lien Act gives a mechanic, in the position of a sub-contractor, a lien on the land on which his work is done, or for which materials are provided, by "virtue of being employed or furnishing" materials; but his lien against the land is limited to the amount due from the owner of the land to the contractor through whom he claims. Under this section the lien is not created by its registration, or by the bringing a suit to enforce it. On the contrary the lien is created and exists without registration, or any suit, for the space of thirty days from the completion of the work or the furnishing of the materials for which the lien is claimed, simply by virtue of the sub-contractor being employed, or furnishing materials. But it will be observed that this section is in terms confined to giving a lien on the land on which the work is done, or on which the materials are supplied. It says nothing about giving a lien on the moneys in the hands of the owner due to the contractor, except indirectly. It does so indirectly, by limiting the lien on the land to the amount due by the owner to the contractor, so that if the owner, having notice of the liens, would discharge the lien on his land, he must apply the money due to the contractor, in paying the claims of the sub-contractors having such liens, so far as it will extend.

By section 8 of the Act, however, the sub-contractor is also expressly given a

charge upon the money coming from the owner to the contractor, through whom such sub-contractor claims; but then under that section this charge seems to be confined to those sub-contractors "who notify the owner of the premises sought to be affected thereby, within thirty days after such material is furnished or labour performed" of their claims. But the object of this section, we think, is explained by section 11, which, as amended, protects all payments, up to ninety per cent. of the price to be paid for the work, which are made by the owner without notice in writing of the lien of the sub-contractor. Taking these three sections together I am inclined to think that the proper construction of the Act leads to the conclusion that the lien of the sub-contractor under section 3 is not to be understood as simply confined to the land, but that under that section his lien also extends to the money due by the owner to the contractor through whom such sub-contractor claims; but the right to the lien on the money is subject to the provision that the owner may discharge it by *bona fide* payments to the contractor before he, the owner, has written notice of the existence of the lien of the sub-contractor. If, as the writer is inclined to think is the case, the lien of the sub-contractor under section 3 extends both to the land and the money, then it follows that the case of *Lang v. Gibson* is the more correct exposition of the statute.

That section 3 does, in fact, create a lien in favour of a sub-contractor on the money due by the owner to the contractor through whom the sub-contractor claims, notwithstanding the terms in which it is worded we think, after all, is reasonably clear. Suppose by any deed or instrument it was declared that A. should have a lien on the lands of B. for the amount due by B. to C. could it be contended that A. had no lien on the money due by B. to C? We

## MECHANICS' LIENS—RECENT ENGLISH DECISIONS.

are disposed to think that it could not, and that is exactly the position in which a sub-contractor is placed under section 3. He is declared to have a lien on the land of the owner to the extent of the money due by the owner to the contractor by whom he (the sub-contractor) is employed. If this be the proper view of section 3, then it is plain that the decision in *McCully v. Ross* has proceeded on a wrong basis in assuming the attaching creditor to be prior in point of time, because the lien created by section 3 in favour of the sub-contractor was, according to the statement of the case, plainly prior in time to the obtaining of the attaching order.

No doubt under section 8, if money were attached and paid over under order by the owner before he had written notice of the liens of the sub-contractors upon it, he would be protected. Possibly, however, the money even in such a case could be recovered by the lienholder from the attaching creditor to whom it had been paid. If the owner had written notice of the lien of the sub-contractor it is clear that he would be bound to set up this *ius tertii*, and if he neglected to do so and suffered an order to be made for payment of the money to the attaching creditor, it would be no discharge to him as against the claim of the lienholder.

## RECENT ENGLISH DECISIONS.

The *Law Reports* for December comprise 15 Q. B. D. pp. 561-711; 10 P. D. pp. 137-199; 30 Chy. D. pp. 191-657; and 10 App. Cas. pp. 437-679.

## WILL—CONSTRUCTION—SUPPLYING BLANK IN WILL. •

The case of *In re Harrison, Turner v. Hellard*, 30 Chy. D. 390, arose out of the negligent use of a blank form in drawing a will. The will, after providing for payment of debts by the executrix thereafter named, gave all the tes-

tratrix' real and personal property "unto— to and for her own use and benefit absolutely; and I nominate and constitute and appoint my niece, Catharine Hellard, to be executrix of this my last will and testament."

Both Kay, J., and the Court of Appeal held that the original will might be looked at for the purpose of aiding the construction, and looking at the will and seeing that it was a printed form with blank spaces left by the printer, one of which occurred after the word "unto," which the testatrix had not cancelled or drawn her pen through but left as she found it, they came to the conclusion that the will might be read as elliptically conferring a gift on Catharine Hellard. Lord Esher, M.R., laid down what he termed a golden rule of construction, viz., "that when a testator has executed a will in solemn form, you must assume that he did not intend to make it a solemn farce—that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy."

## EQUITABLE MORTGAGE BY DEPOSIT—VOLUNTARY PAROL TRANSFER OF CHARGE.

*In re Richardson, Shillitto v. Hobson*, 30 Chy. D. 396, was a case in which an equitable mortgagee by deposit of a deed had handed over the deed as a gift to his nephew, and by parol assigned him the money due in respect of it, and the question was whether this amounted to a valid assignment of the equitable mortgage, and Kay, J. (who was affirmed by the Court of Appeal), held that it did not, and that as the transferee of the deed had not a valid transfer of the charge he was not entitled to retain the deed as against the administrator of the deceased equitable mortgagee.

## UNDER-LEASE—EFFECT OF AGREEMENT THAT UNDER-LEASE SHALL CONTAIN THE SAME COVENANTS AS ORIGINAL LEASE.

The Court of Appeal in *Haywood v. Silber*, 30 Chy. D. 404, had to consider the effect of an agreement between the plaintiff and defendant whereby the plaintiff agreed to grant the defendant an under-lease of certain property "to contain all usual covenants (including a covenant not to assign or underlet without the consent of the plaintiff, such consent not to be withheld if the proposed assignee or

## RECENT ENGLISH DECISIONS.

tenant be respectable and responsible,) together with such other covenants, clauses and provisoes as are contained in the lease under which the premises are held." The original lease contained (1) a covenant that if any dispute arose between the plaintiff and any other tenant of the lessors, it should be referred to the arbitration of the lessors; (2) that the lessee, his executors, administrators and assigns, would not sublet without the license of the lessors; (3) and that all demises and assignments should be prepared by the solicitors of the lessors. The under-lessee claimed that these latter covenants should be merely taken as models of covenants to be inserted in the under-lease, substituting the names of the under-lessor and lessee for those of the original lessors and lessee; but Pearson, J., and the Court of Appeal came to the conclusion, having regard to the special circumstances of the case, that the under-lessor was entitled to have the covenants in the under-lease so framed, that the under-lessee should be bound to refer disputes between himself and any tenants of the original lessors to the latter; and also not to assign or sublet without the consent of the original lessors, and also to have all demises and assignments made by him of the demised premises, prepared by the solicitors of the original lessors.

APPEAL BY A PERSON NOT A PARTY—SETTING ASIDE  
JUDGMENT OBTAINED BY COLLUSION.

*In re Youngs, Doggett v. Revett*, 30 Chy. D. 421, presents some points of similarity to the recent case in our own Court of *Glass v. Cameron*, 9 O. R. 712, inasmuch as the appellant was a third party claiming the right to apply to vary or set aside a judgment on the ground of being injuriously affected thereby. The parties to this "triangular duel" stood in the following positions: The plaintiff, Mrs. Doggett, was the residuary legatee of a Mrs. Young, who was the executrix of Mr. Young. Revett was the executor of Mrs. Young, and therefore also the personal representative of Mr. Young. Mrs. Vollum claimed to be a creditor of Mr. Young, and brought a suit against Revett for administration, alleging breaches of trust by Mrs. Young. Revett consented to a decree in this suit. Mrs. Doggett had previously commenced a suit against Revett for administration of Mrs. Young's estate. She now claimed

to be injuriously affected by Mrs. Vollum's judgment, and, to use the words of Lindley, L.J., she said in substance:—"I had an action against you, Revett, in which I was claiming the residue of Mrs. Young's estate to which I was entitled, and in order to diminish that residue and make it disappear, you and Mrs. Vollum concocted a suit which was a conspiracy to cheat me; and you, Revett, have, by collusion with the solicitor of Mrs. Vollum, consented to a decree which robs me of every chance of getting a farthing." It was this judgment in the case of *Vollum v. Revett* that the appellant claimed to set aside. The Court on the merits held that no case for interference was made out, and dismissed the application. Mrs. Doggett, besides moving to set aside the judgment in *Vollum v. Revett*, also appealed from it, claiming to be a party on whom the judgment should have been served, but the Court held that she had no *locus standi*, as she, not being directly interested in Mr. Young's estate, was not a necessary or proper party to proceedings to administer that estate, and therefore had no right to be served with the judgment in *Vollum v. Revett*.

SOLICITOR AND CLIENT—CONDITIONAL DELIVERY OF  
BILL.

*In re Thompson*, 30 Chy. D. 441, was a case very similar to *In re Spencer and McDonald*, 19 Gr. 467. A firm of solicitors delivered to their client a bill of costs accompanied by a letter saying that there were certain charges which, owing to haste, had not been included in the bill, but that they were willing to accept a stated sum in full discharge, though if such sum were not paid in eight days they reserved the right to withdraw the bill and deliver another. The client, however, insisting on being furnished with the particulars of the further charges, the solicitors wrote withdrawing the bill. The client then obtained a common order for taxation, and for delivery and taxation of a further bill. On motion by the solicitors, Bacon, V.C., discharged this order, holding that there had been no delivery of the bill, but ordered the solicitors to deliver a bill. In pursuance of this order the solicitors delivered a second bill of considerably less amount than the first. On appeal by the client from V.C. Bacon's order the Court of Appeal held that the first bill was conditional, but that the con-

## RECENT ENGLISH DECISIONS.

dition was one which a solicitor could not impose on his client, and that therefore the original order for taxation must stand, but no costs in the Court below were given because the client, under the circumstances, should not have taken the common order for taxation, but should have applied on petition raising the question of the right of the solicitors to withdraw their bill. The Court was, however, of opinion that a solicitor might deliver a bill stating that there were charges in it which the client could not be forced to pay, but which represented work fairly done, with a suggestion that these charges should be paid, but intimating to the client that if he did not like to adopt the bill he would deliver a bill including only those charges which would bear taxation and could be enforced against the client, and that such a condition would be valid.

## TREES—WINDFALLS—PERSONAL REPRESENTATIVE.

*In re Ainslie, Swinburn v. Ainslie*, 30 Chy. D. 485, is an illustration of the maxim "*quicquid plantatur solo, solo cedit*." A testator devised estates upon which there were plantations of larch trees. At the time of his death a number of these trees had been more or less blown down by wind. Pearson, J., held that as between the devisee and the executors the latter were entitled to the trees which had been blown down to such an extent that they could not grow as trees usually grow, and that the trees which were merely lifted, but would have to be cut for proper cultivation, belonged to the devisee. The Court of Appeal refused to assent to this rule. Cotton, L.J., says: "Larch trees naturally grow upright, but it may well be that a larch tree is absolutely fixed to the soil, though it may grow in a position in which, if the wind had not occurred, it would not have naturally grown. That is not the test;" and the Court was of opinion that the only rule which could be laid down was, that if the tree is severed it belongs to the executors, but if it is not severed it belongs to the inheritance; and whether the severance had taken place is a question of fact regarding each tree, but they agreed that if the roots were broken in the soil, so that the tree and its roots were in truth, and in fact, severed from each other, then although some of the broken parts of the tree might still remain covered with earth it would be severed, though

to a casual observer it might seem to have some of its roots in the ground.

## TRUSTEE—INVESTMENTS ON DEFICIENT SECURITY.

*In Smethurst v. Hastings*, 30 Chy. D. 490, the defendants were trustees who, with the consent of a tenant for life, were authorized to make investments upon leaseholds. Investments were made with the consent of the tenant for life, who subsequently died, the parties then becoming entitled to the trust fund took assignments of the securities. It was afterwards discovered that the investments had been made without any proper valuation, that the property was of a speculative value, houses being in course of erection thereon, and unproductive, and that the security was insufficient. The present action was brought to make the trustees liable for the deficiency; and their conduct of the trust, being judged by "the prudent man" standard, was found wanting, and they were held liable by Bacon, V.C., notwithstanding the acceptance of the transfer of the securities by the *cestuis que trust*. It appears by the report that notice of appeal was given but that the case was subsequently compromised.

## WILL—BEQUEST OF INCOME TILL MARRIAGE, AND CORPUS ON MARRIAGE.

The question in *In re Wrey, Stuart v. Wrey*, 30 Chy. D. 507, was a very simple one, arising on a will whereby a testatrix bequeathed the residue of her stocks and shares upon trust to pay the income to G. until his marriage, and at the time of his marriage to hand over the stocks and shares to him—there was no gift over in the event of his not marrying. Kay, J., held that the legacy was vested and that the legatee, being of age, was entitled to an immediate transfer of the stocks and shares to him though he had not married.

## WILL—SECOND COUSINS—FIRST COUSINS ONCE REMOVED—GIFT OVER.

*In Wicks v. Bannister*, 30 Chy. D. 512, Kay, J., held that under a gift to second cousins first cousins once removed would take—the testator not having in fact any second cousins, either at the date of his will or when he died, and that a gift over on death "before payment" of the bequest was to be construed as "before becoming entitled to payment."



## RECENT ENGLISH DECISIONS.

## PARTNERSHIP—MORTGAGE OF SHARE OF PARTNER.

In *Whitham v. Davey*, 30 Chy. D. 574, the question arose as to the date at which a mortgagee of a share of a partner in the partnership, was entitled to have the account of the mortgaged share taken. North, J., held that the proper date at which the share should be ascertained, was the date of the commencement of the action to enforce the mortgage, but if there had been a prior dissolution of the partnership, then the date of such dissolution would have been the proper date.

## BILL OF EXCHANGE—FOREIGN ENDORSEMENT—CONFLICT OF LAWS.

A question of mercantile law came up in *re Marseilles Extension Ry. Co., Smallpage's and Brandon's cases*, 30 Chy. D. 598. Bills of exchange were drawn in France by a domiciled Frenchman, in the French language in English form, on an English company who duly accepted them. The drawer endorsed them to an Englishman in England. The acceptors disputed their liability to the latter on the ground that the endorsements were invalid according to French law, but it was held by Pearson, J., that the endorsements being valid according to English law the endorsee was entitled to recover; the form of the bill leading to the conclusion, that, as between the drawer and acceptors, they were intended as English bills. The contest arose upon the winding up of a company, and though the liquidator failed in the contest, it was held that the costs should not be awarded against him personally, but should be borne by the estate.

## WILL—DEVISE OF ONEROUS PROPERTY.

The simple question in *Syer v. Gladstone*, 30 Chy. D. 614, was whether a person entitled under a will to a freehold house and the furniture and effects therein for life, could—there being a mortgage on the house—enjoy the use of the furniture without also keeping down the interest on the mortgage, and Pearson, J., held that he could.

## FORFEITURE CLAUSE ON BANKRUPTCY.

*Robertson v. Richardson*, 30 Chy. D. 623, is a case turning upon a clause in a settlement for forfeiture, in case of bankruptcy. The property in question was settled upon the husband of a married woman after her death for his

life, with a gift over in the event of his bankruptcy or liquidation. In 1881 he filed a liquidation petition under which, in October, 1881, a trustee was appointed. In January, 1883, he obtained a discharge. In April, 1884, the wife died. In March, 1885, the trustee assigned to the husband, for value, all the property belonging to him at the commencement of the liquidation, and devolving on him subsequently up to the date of the discharge, other than that which had been already received by the trustee. The liquidation was never formally closed, but the trustee had never made any claim to the settled fund. Pearson, J., held that the forfeiture had taken effect, for the reason that the wife having died in April, 1884, the bankrupt in June, 1884, would have been entitled to receive an apportioned part of the income, or, at any rate, would have been entitled to receive the income six months after his wife's death, and at that time he had no protection from the trustee in the liquidation, who, therefore, but for the forfeiture clause, would have been entitled to receive the income, and was the only person who could have given a discharge for it, and on this ground, viz., that a right to receive the income had accrued during the bankruptcy, he distinguished the case from *Whyte v. Chitty*, 1 Eq. 372; *Lloyd v. Lloyd*, 2 Eq. 722; and *Ancora v. Wadell*, 10 Chy. D. 157.

## EXPROPRIATION OF LAND—TAKING MORE THAN IS NEEDED.

*Touliere v. St. Mary Abbots*, 30 Chy. D. 642, is a case very similar to *Gard v. Commissioners of Sewers*, 28 Chy. D. 486, noted *ante*, vol. xxi., p. 210. A municipal body, for the purpose of widening a street, required part of the buildings and site of an orphanage, leaving a substantial part of the premises not actually required, and it was held by Pearson, J., that the owners wishing to sell only the part actually required, the municipality could not take the whole.

## CONVERSION—REAL ESTATE—ELECTION TO TAKE PERSONALTY AS REALTY.

The only remaining case to be noticed in the Chancery Division is *In re Lewis, Foxwell v. Lewis*, 30 Chy. D. 654. In this case a testator being entitled to a house, of which he had agreed to grant a lease for twenty years

with an option to the tenant to purchase the reversion at any time during the term, devised the property to trustees on trust to sell and pay the income to his wife during her life or widowhood, and after her death or second marriage to divide the trust fund equally between his children who should survive him. The testator died in 1869, leaving his widow and two children. The latter died without issue and unmarried in the lifetime of the widow. The property subject to the lease was not sold, and the tenant had not exercised the option to purchase. The widow continued in the receipt of the rents of the house until 1885, when she died without having married again. The question then arose whether the house passed to her heir or next of kin, and Pearson, J., held that it went to the next of kin as personality, and that the wife could not be deemed to have elected to take the property as realty by reason of the existence of the tenant's option to purchase, and on this ground he distinguished the case from *Re Gordon*, 6 Chy. D. 531. In doing so he gave expression to a regret that it is not the law that property is always to be taken in the character in which it is actually found at the time when it is to be distributed.

#### RESTRICTIVE COVENANT—WHAT AMOUNTS TO.

Turning now to the Appeal Cases we find none of them requiring notice here, and we only propose briefly to refer to *Russell v. Watts*, 10 App. Cas. 590, not for the purpose of drawing attention to the point decided, but for the sake of extracting an observation of Lord Blackburn on the form and effect of covenants. He says, at p. 611:—

I take it to be clear that any form of words which, when properly construed with the aid of all that is legitimately admissible to aid in the construction of a written document, indicates an agreement, forms, when under seal, a covenant, and that a covenant may, if it is necessary, in order to carry out the intention, operate as a grant.

As illustrative of the expedition of the English reporters we may say that the report of the appeal of the late rebel Riel to the Privy Council, which was heard in the latter part of October, appears in this number of the Appeal Cases.

This concludes our review of the December number of the *Law Reports*.

## REPORTS.

### ONTARIO.

#### COUNTY COURT OF THE COUNTY OF ONTARIO.

#### RE CREDITORS' RELIEF ACT AND DUNCAN ET AL. V. TURNER; SMITH, Garnishee, and

#### MADELL V. TURNER.

*Creditors' Relief Act—Payment to the Sheriff by a debtor of the defendants, and by a garnishee—Moneys in Court.*

*Held*, 1, that a payment into Court, in anticipation of an attaching order, by a party having moneys in his hands belonging to the debtor, was properly made and constituted a levy within the meaning of the Act.

*Held*, 2, that an order directing the Clerk of a Division Court having moneys in his hands (paid into Court by a garnishee) to pay the same over to the Sheriff was properly made, even if the prior payment to the Sheriff was not sufficient to bring the matters within the scope and meaning of the Act.

The summons to set aside the order having asked costs, and having charged collusion and misconduct against the opposing solicitor and his client and officers of the Court, was discharged with costs.

[Whitby—January, 1886.]

On 17th December, 1885, Duncan and Parsons recovered judgment against the defendant, R. H. Turner, in the 5th Division Court of the County of Ontario for \$86.04, and against George Smith, the garnishee, in the same action for \$87, which the latter paid into Court. On the same day Madell recovered his judgments against Turner, executions upon which were returned *nulla bona*, and these judgments were subsequently made County Court judgments, and writs against goods and lands placed in the Sheriff's hands.

Previous to the recovery of these judgments, Turner had assigned to his father, William Turner, all his book debts and the sum due to him from Smith. William Turner intervened in the garnishee proceedings, claiming the money in Smith's hands as garnishee under his assignment, and the claim was disallowed; it being held that the assignment was void under R. S. O., c. 118.

Mr. Hayes, acting as solicitor for William Turner, collected book debts to the amount of \$9.75, and as it had been decided in effect that these moneys were the moneys of the defendant, R. H. Turner,

Co. Ct.]

DUNCAN ET AL. V. TURNER, ETC.

[Co. Ct.]

he, on 2nd January, 1886, paid the sum into the hands of the Sheriff, who thereupon, made an entry in his books under "The Creditors' Relief Act."

On the 7th January, 1886, Duncan and Parsons applied to the Clerk of the 6th Division Court for payment to them of the amount paid in by Smith, which payment he declined to make, having been notified by Madell's solicitor not to do so, as he claimed a share of the moneys.

Madell's solicitor, on 13th January, 1886, obtained an *ex parte* order directing the Clerk to pay over to the Sheriff, under "The Creditors' Relief Act," the moneys in his hands, which order was complied with, and the Sheriff entered the receipt of such moneys in his books on the 19th January.

Duncan and Parsons then obtained a summons to set aside the order of 13th January, and for an order directing the Sheriff to repay to the Clerk the moneys transmitted, and the summons asked for costs against Madell.

The affidavit upon which the summons was granted charged collusion against Madell, his solicitor and the bailiff of the Division Court.

N. F. Paterson, Q.C., for the applicant, contended that the Judge was deceived or surprised into making the order of 13th January; that the first payment to the Sheriff was a collusion and fraudulent contrivance to bring the case within the provisions of the Act; that the moment the moneys came into the Clerk of the Division Court's hands they became at once the moneys of Duncan and Parsons, and that under ss. 2, of sec. 21, the Sheriff's only remedy was by action and not in a summary way.

DARTNELL, J.J.—I am confirmed in my opinion that "The Creditors' Relief Act" applies in this case. Section 21 seems to provide for cases (which are not uncommon) where the only assets the debtor has are book, or other, debts due to him. It would be impossible in such a case to make an actual, or tangible, seizure or levy. Sub-sec. 4 of that section enacts that "moneys garnished and paid into the Sheriff's hands, shall be deemed to be moneys levied under executions within the meaning of the Act."

I think all the facts show that sec. 21 applies—Mr. Hayes anticipated an attachment of the moneys in his hands by the Sheriff by paying these moneys to the Sheriff. I can see no reason—because they are moneys—why they should not be available for Turner's creditors. If Mr. Hayes, instead of holding money, had become the bailee of a chattel, surely he would be justified in handing it over to the Sheriff.

Then, as to the moneys paid into Court by Smith under sub-sec. 6, even if the Clerk had paid over to Duncan and Parsons, the Sheriff could recover from

them. If these funds were in Court, they were under the Court's control. If they were not under such control, but were the absolute property of the garnishors, then the Sheriff could recover them from the garnishors. What the latter seem to complain of is that the funds were made available for Turner's creditors, including themselves, not by action but in a summary way. I think the word "recover" is broad enough to include what has been done, and that the Sheriff is not bound to bring an action.

If the Sheriff does not take any proceedings, s.s. 2, of sec. 21 permits "any person entitled to distribution to take the same for the common benefit of himself, and all other persons entitled."

This was done in the case under consideration.

I think the order of the 13th January was made properly, even if the first payment of \$9.75 was not equivalent to a levy by the Sheriff, but I think it was.

The policy of the law now definitely recognizes the principle of equal distribution of assets. Where a creditor has received his debt in full from an executor or administrator, and there is a deficiency of assets, the other creditors can recover back from the favoured creditor any excess over and above a rateable dividend among all the creditors. The same principle has recently been extended by the Chancellor, in the case of *Dawson v. Moffat*, to stop orders affecting funds in Court.

I think in this case the spirit if not the letter of the Act has been complied with, and I dismiss the summons. The points being difficult and new, I might have done so without costs; but, as charges of misconduct and collusion have been made against Madell and his solicitor, which have wholly failed, and as costs were asked against Madell, I discharge it with costs, to be paid by the applicants to Madell. If the Sheriff, who was served with the summons, has any costs, these are to be paid by Madell, and added to his own costs.

## RE THOMSON, AND THE CREDITORS' RELIEF ACT—MUNRO V. ST. THOMAS BISCUIT CO.

RE THOMPSON, AND THE CREDITORS  
RELIEF ACT.*Levy—Notice by sheriff of entry—Priority of costs—  
Valuing security.*

[Whitby, June 15, 1885.—Dartnell, J.J.]

DARTNELL, J.J.—The sheriff must take the responsibility of determining when he should make the entry in his books, directed by sec. 5, sub-sec. 2, and *semble* the judge has no authority to direct him to amend his entry, even if he considered it wrong.

There is no priority for costs under the Act.

There is no provision for valuing securities, but the dividend of secured creditors was directed to be retained until further order, so as to await either the realization of the securities, or a valuation thereof by the creditors holding, should they be willing or advised so to do.

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COUNTY COURT OF THE COUNTY OF  
ELGIN.MUNRO V. ST. THOMAS BISCUIT AND  
CONFECTIONERY COMPANY.

*Joint Stock Companies' Winding-up Act, 41 Vict. ch. 5—Ontario Joint Stock Companies' Letters Patent Act, R. S. O. ch. 150—Contributory—Right of paid-up stockholder to petition for winding-up order.*

[St. Thomas, Jan. 12, 1886.]

The petitioner was a stockholder in this company which was formed by letters patent under R. S. O. ch. 150. All his stock was fully paid up and he became and continued to be its manager from its inception until, through his mismanagement, as alleged, it became involved in financial difficulties. The directors, of whom he was one, borrowed money to keep its business afloat by discounting their private note at the bank. Then the shareholders displaced the petitioner and appointed another manager, and the new manager's name was substituted for Munro's on the renewal of the bank paper. One Reynolds, who was one of the directors, was subsequently pressed by the bank to pay the note overdue, and he was obliged to retire it out of his own funds. He immediately sued the company, and recovered judgment by default. Execution was placed in the sheriff's hands and all the plant and assets of the company were seized and advertised for sale. The petitioner then, upon allegations of fraud on the part of the directors by allowing that judgment to be recovered, presented a petition under section 5 of the Wind-

ing-up Act. The period fixed for the duration of the company had not expired, and no event, other than the insolvency of the company, had transpired by which the company could be wound up compulsorily or otherwise, nor had the directors passed any resolution requiring it to be wound up under section 4.

A summons was taken out, calling upon the company and the execution creditor to show cause why the company should not be wound up so that the property seized might be applied in satisfaction of its liabilities and be distributed amongst the members under the Winding-up Act, and an order was made upon the sheriff staying proceedings upon the execution.

HUGHES, Co.J., *held* (1) That a stockholder who has paid up his stock in full is not "a contributory" within the meaning of sub-sec. 2 of secs. 3 and 5.

(2) That the execution plaintiff, under the facts stated, had a right to recover a judgment for any debt due to him by the Company as for money paid to their use.

(3) That the petition must be dismissed because it would be unjust to the execution creditor, and there being no fraud shown to exist; and because all the creditors could give notice to the sheriff under the Creditors' Relief Act quite as well as to share under a winding-up order.

The following cases were referred to by the learned judge in the course of his judgment: *Re National Savings Bank Association*, L. R. 1 Chy. 547; *Re Anglesea Colliery Case*, L. R. 2 Eq. 37, 1 Chy. 555; *Rica Gold Washing Co.*, L. R. 11 Chy. Div. 42.

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## SECOND DIVISION COURT OF NORFOLK.

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## COOMBS V. MICHIGAN CENTRAL RY. CO.

*Railway—Accident—46 Vict. ch. 24, sec. 9—Fences—Occupant—Damages not by train or engine—Negligence.*

The plaintiff sought to recover \$40 damages from the defendants for the loss of his cow which was killed by an employé of defendants under the following circumstances:—It and another cow were grazing in a field adjoining the defendant's railway track which was fenced off therefrom by a fence some 3 feet 8 inches high, which is much less than the height of an ordinary fence, viz., 5 feet, as required by the Railway Act. Plaintiff's cow was simply being pastured there, plaintiff paying the owner of the land so much per month therefor. The cows broke down a part of the fence and got

## COOMBS v. M. C. RY. CO.—RE C. P. RY. AND TP. OF PICKERING—NOTES OF CANADIAN CASES.

on to the track. Defendants' section-man coming along found the cows there, and seeing where they had got in tried to drive them out where they had got in, the fence being at that point about 2 ft. 8 inches high. The other cow jumped the fence successfully, but plaintiff's cow got one of her hind legs caught between the fence and the top rail which had been knocked down by the cows in getting on to the track, broke her leg and had to be killed.

*T. R. Slaght*, for plaintiff.

Kingsmill, Cattanach and Symons, for defendants.

LIVINGSTONE, Co. J.—I think plaintiff must fail. In the first place, if the damages sued for are such as are contemplated by the statute, I do not think he is an occupant within the meaning of the Railway Act, 46 Vict. ch. 24, sec. 9 (see the remarks of WILSON, C.J., and ARMOUR, J., in *Conway v. C. P. Ry. Co.*, 7 Ont. Rep. 673), and so cannot recover. Although the case is not expressly in point and is now in appeal before the Supreme Court, still the reasoning is applicable. I think the occupancy must be of some distinct part of a lot either in severalty or jointly with some one else, and that a mere right to put a cow into a certain field for the purpose of pasturing it does not constitute an occupancy within the statute.

In the second place, I do not think the action will lie under the statute, because the damage was not done by the defendant's trains or engines.

In the third place, admitting that there is no statutory liability, I do not think there is any common law liability, inasmuch as I do not think that the section-man was guilty of such negligence as to entail any legal liability upon the defendants, as I do not think he acted unreasonably in the premises.

## ASSESSMENT CASE.

## COUNTY OF ONTARIO.

## RE THE CANADIAN PACIFIC RAILWAY AND THE TOWNSHIP OF PICKERING.

*Assessment of land used—Road-bed for railway—Station grounds—Gravel pits.*

[Whitby, June 16.—Dartnell, J.J.]

The Canadian Pacific Railway passed through the Township of Pickering, occupying as road-beds and one station-ground about 146 acres of land. They also had acquired about 14 acres which they used as gravel pits.

*MacMurchy*, for the company.

*J. E. Farewell*, for the township.

DARTNELL, J.J.—The 146 acres should be assessed according to the average value of the holdings through which the railway passes, irrespective of the fact that many of the farms are of less size than 200 acres—the whole township lot.

The station building should only be assessed for any excess in value over and above the average value of farm buildings upon the farms in the neighbourhood, approximate in size to the quantity of land used by the railway.

The gravel pits should be assessed according to their value to the company as such, and not as farming lands.

## NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

## QUEEN'S BENCH DIVISION.

## IN BANCO.

## CHRISTIE V. BURNETT.

*Memorandum in writing—Statute of Frauds—Parol evidence.*

*Held*, that the letters of the defendant set out in the case constituted a sufficient note or memorandum in writing within section 17 of the Statute of Frauds, and that parol evidence was admissible to show what the words "work" and "rig" used therein referred to.

*Creasor*, Q.C., for motion.

*Masson*, Q.C., contra.

## SHERIDAN V. PIDGEON.

*Negligence—Surgeon—Addition to verdict.*

In action against a surgeon for negligence the jury, in finding for plaintiff, added this to verdict: "We are of opinion that defendant made a mistake in not calling in skilful assistance, but not wilfully or through inattention."

*Held*, a mere expression of opinion, and that it did not nullify or affect the verdict.

*Nesbitt*, for motion.

*Masson*, Q.C., and *Stone*, contra.

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

## REYNOLDS v. ROXBURGH.

*Hiring chattel for reward—Implied warranty.**Held*, that the hirer out of a chattel for reward impliedly warrants its fitness for purpose hired.*Nesbitt*, for motion.*Dumble*, contra.

## LEGACY v. PITCHER.

*Venue—Abolition of, by O. J. Act.**Held*, that local venue is abolished by the Ontario Judicature Act.*V. McKenzie, Q.C.*, for motion.*G. T. Blackstock*, contra.

## REGINA v. FEARMAN.

*Larceny—43 Vict. c. 28, s. 66—Conviction.*

The prisoner was indicted for larceny under the Indian Act, 1880, section 66, and was convicted.

*Held*, WILSON, C.J., dissenting, that he ought not to have been convicted, because, *per* ARMOUR, J., the wood, the subject of the alleged larceny, was not "seized and detained as subject to forfeiture"; and because, *per* O'CONNOR, J., the affidavit required by section 64 had not been made, and was a condition precedent to a seizure.*Per* WILSON, C.J., that he was properly convicted.*Johnson*, for the Crown.*McKenzie, Q.C.*, contra.

## CHANCERY DIVISION.

Ferguson, J.]

[February 15.]

## RE FLEMING.

*Executor—Compensation—Commission—R. S. O. c. 107, s. 36-40.*

This was a petition by an executor of the will of Charles Magrath, deceased, asking the Court to fix a fair and reasonable allowance for his care, pains and trouble and time expended as executor in and about the estate of the said Charles Magrath. A reference was accordingly made to the Master in Ordinary to

fix the amount of compensation, under R. S. O. chap. 107, sec. 36-40. Evidence was taken in his office, from which it appeared that Charles Magrath died in the month of May, 1884, leaving a will by which he made William Magrath sole legatee and devisee of the whole of his property, with the exception of an annuity of \$400, payable to his widow. He added, however, the following words after the general bequest to William Magrath, "I commend to his care my said dear wife, and that, notwithstanding the above bequest, that in as far as in him lies he shall see that she does not want for all reasonable maintenance and comforts becoming her station in life." And he appointed the present petitioner and W. Magrath executors of his will. The evidence further shewed that the estate of which Charles Magrath died possessed amounted to between \$115,000 and \$120,000, of personalty consisting of some \$32,000 on deposit in a bank, and of a number of debentures and stock of various descriptions, a great many of which were payable to bearer. The evidence further shewed that the actual labour involved in connection with the estate, which, under any circumstances, did not seem to have been very great, was done by the solicitor of Mr. William Magrath, acting also for the present petitioner in the matter, and that the present petitioner did such acts as were required by way of conformity, such as signing checks when required and doing formal acts required, first, to put the estate in his name and in the name of his co-executor, and then transfer it to Mr. William Magrath solely; but the petitioner appeared to have relied implicitly on the advice of the said solicitor in what he did. Mr. William Magrath himself lived away from Toronto where the work was done, and where the deceased died, and consequently what there was for the executor to do was mainly done by the petitioner, who also exerted himself to procure an additional sum for the widow in furtherance of the wishes of the testator expressed in the words quoted above. The Master in Ordinary allowed as commission two and one half per cent. upon the \$32,000 on deposit in the bank, which, it appeared, had been paid out on the cheque of the executors to various persons to whom the said solicitor had loaned it upon mortgage of real estate, and he allowed a commission of one per cent. upon the amount

Chan. Div.]

NOTES OF CANADIAN CASES.

[Prac.]

of the debentures and stock. Upon appeal from the report on the grounds that the commission was inadequate, and not in accordance with the principles heretofore acted upon by the Court in these cases, the commission for the petitioner was increased to three and one half per cent. upon the whole of the estate. After a review of the authorities the learned judge said: "I think I may without more express the opinion of which I had scarcely any doubt at the beginning or at the argument that our Courts have adopted a commission or percentage as a means of ascertaining or measuring the amount of the allowance to be awarded to executors, trustees and administrators under the provisions of the statute, and that it is the mode adopted generally when the circumstances of the case are such as to admit of its ready adoption, and that the cases in which a different mode or method has been adopted are to be considered as exceptions to this rule, which should be considered the general rule, the exception in each instance being for some good reason appearing in the case, and I think it sufficiently appears from the cases that the usual percentage or commission allowed is five per cent. upon the amount of the estate got in and paid or over properly applied, and that this in the ordinary case is allowed upon the determination of the trust, although there are exceptions to this last. This rate of five per cent. in the ordinary case seems to be so generally alluded to in the authorities that I think it may be safely said to have been adopted as the general rule in measuring the allowance under the provisions of the statute." He then proceeded to say that looking at the relative amount of work done and services rendered by the petitioner as compared with the co-executor, William Magrath, he considered that of the commission of five per cent. the petitioner was entitled to at least one per cent. more than the half.

S. H. Blake, and A. H. F. Lefroy, for the petitioner.

Boswell, for the respondent, William Magrath.

## PRACTICE.

Rose, J.]

[February 16.]

## BROWN V. PORTER.

*Postponing trial—Costs.*

Where a party has made diligent efforts to secure the attendance at the trial of a witness within the jurisdiction of the Court, and has failed to secure it from a cause which he could not control, the costs of an application by such party to postpone the trial should be costs in the cause, unless it was possible to take the evidence before a special examiner, or the knowledge of the fact that the attendance could not be secured came to the applicant in time to enable him to advise the other side, so that the witnesses might be notified not to attend.

*Watson*, for the plaintiffs.

*Lount*, Q.C., for defendants.

C. P. Div.]

[February 16.]

## RE BUSHELL V. MOSS.

*Prohibition—Division Court—Title to land—Question of fact.*

The plaintiff sued in a Division Court for the conversion of a mirror, which, the defendant contended, was annexed to the freehold and passed therewith. The judge of the Division Court found that the mirror was a chattel and gave judgment for the plaintiff.

*Held*, that the Court could not interfere by way of prohibition.

*W. H. P. Clements*, for the plaintiff.

*Aylesworth*, for the defendant.

Chan. Div. Ct.]

[February 20.]

## CANADIAN PACIFIC RY. CO. V. MANION.

*Changing place of trial—Ejectment—Rule 254 O. J. A.—R. S. O. ch. 51, sec. 23.*

The decision of PROUDFOOT, J., *ante*. p. 70, was affirmed on appeal.

*W. H. P. Clements*, for the appeal.

*Arnoldi*, contra.

## CORRESPONDENCE.

## CORRESPONDENCE.

## ULTRA VIRES.—III.

## LICENSES AND PROHIBITION.

To the Editor of the LAW JOURNAL:

Having now obtained the latest decision of the Privy Council that the McCarthy Act, as it has been called, is unconstitutional, it may be useful to discuss briefly the net result of the various decisions of the Court of last resort on questions arising out of the provisions of the B. N. A. Act respecting the Liquor Traffic and Licenses. I will first set out the wording of the B. N. A. Act on these points respectively:—

"Sec. 91: Parliament may make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to

"2. The regulation of trade and commerce.

"3. The raising of money by any mode or system of taxation."

Then in each Province, by sec. 92:

"The Legislature may exclusively make laws in relation to

"2. Direct taxation within the Province, in order to the raising of a revenue for Provincial purposes.

"8. Municipal institutions in the Province.

"9. Shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for Provincial, local or municipal purposes.

"13. Property and civil rights in the Province.

"15. The imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.

"16. Generally all matters of a merely local or private nature in the Province."

## I.—THE CANADA TEMPERANCE ACT OF 1878.

The object of this Act being evidently to diminish the evils caused by intoxicating drinks, it is clearly for the peace, order and good government of Canada, in relation to a matter not assigned exclu-

sively to the Local Legislatures. It is also an Act which affects the trade in intoxicating liquors wherever enforced, and so comes within the subject "regulation of trade." It is difficult, therefore, to understand how it could have been gravely contended that the Act was unconstitutional.

## II.—THE PROVINCIAL LICENSE ACT.

When the Imperial Parliament assigned "licenses in order to the raising of a revenue" to the Local Legislatures, they created a sub-class out of the more general subject of "the regulation of trade" or "the raising of money by any mode or system of taxation," which were given to Parliament; therefore, according to the canons laid down in the first letter of this series, Parliament cannot in any manner legislate on this subject.

There are several objects which a license law may be supposed to have in view, as (a) in order to the raising of a revenue for Provincial, local or municipal purposes; (b) by limiting the number allowed, to diminish the amount of drinking, and so to lessen the evils arising from the excessive use of intoxicating liquors; (c) by making regulations to be observed by the license holders to secure, as far as possible, orderly behaviour in taverns and saloons, for the furtherance of peace, order and good government.

Apart from decided cases one would suppose that the Local Legislatures could only legislate upon licenses to raise revenue (a); the objects, (b) and (c) appearing plainly to come within the duties and powers of the Federal Parliament. If this be so, then the Legislatures are really confined to the taxation of all persons engaged in any of the businesses referred to, and such taxation must be *bona fide* for revenue merely, and must not be imposed with a view of prohibiting or diminishing the volume of the liquor traffic. Nor can it be coupled with any measure to regulate the traffic, or to provide for peace, order and good government. Any measure to secure these objects ought to come from Parliament.

The power to impose a tax of this kind may carry with it the power to punish any person who attempts to carry on any of these callings without paying the tax required (ss. 15 of s. 92). But it does not necessarily carry with it the power to limit the number of licenses to be issued in any place. That seems to me to be a restriction of trade not *bona fide* required "in order to the raising of a revenue." So that (apart from judicial decisions) it appears to me that the Local Legislatures have no right to limit the number of licenses; and that they must allow all who pay the tax demanded to exercise the calling. Nor,



## CORRESPONDENCE.

again, would it be *bona fide* within the powers given to the Legislatures to place the license fees so high as to be practically prohibitory, for that again would be for quite a different object than the raising of a revenue. It would seem thus far to be the prerogative of Parliament alone to pass all laws intended to prohibit wholly or in part the trade in intoxicating liquors, or to discourage it, or to diminish the evils arising from it.

Some writers in the press, since the decision in the McCarthy Act case has been cabled from England, have hastily rushed to the conclusion that if the McCarthy Act is *ultra vires* so must the Canada Temperance Act, and they quote the argument of Chief Justice Ritchie that the power to prohibit must of necessity go hand-in-hand with the power to permit. One writer asks: "Of what use is the privilege of issuing licenses for the purpose of raising a revenue to the Provinces while the Dominion Parliament has the power to say that only so many licenses, or even none whatever, shall be issued?" But I see no difficulty. It is not exact language to say that the Provinces have the power to permit the liquor traffic; they really only have the power to impose a tax on every person who carries on that traffic, and reading the two provisions together they amount to no more than this: Wherever the Dominion Parliament allows the trade in intoxicating liquors to be carried on, then the Legislatures may compel every person carrying on such traffic to pay a tax for local revenue purposes.

Carrying out the same reasoning it would seem that all provisions regulating the hours of business, the closing on Sunday, and every particular intended to instigate or prevent the evils arising from the traffic, should be within the jurisdiction of the Dominion only. I am aware that the Privy Council has decided otherwise in the Hodge case on the ground that such regulations come fairly within the subject of municipal institution, and matters of a merely local or private nature in the Province; but it may be permitted to me, following the example of the great judge at Calgary who has criticized so fully the very highest courts, to give reasons for thinking that the Privy Council did not correctly decide the Hodge case in that aspect of it.

For if the regulations in question, considering their object and purpose, come fairly within the regulation of trade, and not expressly within any subject assigned exclusively to the Legislatures of the Provinces, then they can only be validly passed or authorized by Parliament. Do they, of necessity, come within the subject of "municipal institutions in the Province?" I think not. There

might be no municipal institutions in the Province at all. These institutions are organized to assume and exercise a portion of the functions of government in the particular localities, and a municipal corporation or government cannot be authorized to do what the legislative body creating it could not do itself.

Then do the regulations there in question come within the "matters of a merely local or private nature in the Province," referred to in sub-section 16? Still less, in my opinion, considering always the object and purpose in view, and especially considering the final part of section 91, which provides that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration in the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." If, then, the regulations in question come fairly within the subject of the regulation of trade, or are laws for the peace, order and good government of Canada in relation to matters not (expressly) assigned exclusively to the Legislatures, they do not come within sub-section 16. I have, I think, given good reasons for thinking they do not necessarily come within sub-section 8—"municipal institutions"—and, if not, they are not within the authority of the Legislatures at all.

It is to be regretted that the Judicial Committee of the Privy Council so early laid down for itself the rule that it would not go beyond the particular facts in each case coming before it, but would confine its decisions to the particular points arising in each case. On this account several cases have been finally decided without taking a comprehensive view of, and carefully examining the scope of the whole Act. Consequently there have been apparently conflicting decisions upon it, and we are still left in great uncertainty as to the proper limits of Federal and Provincial jurisdictions as to many subjects, and especially as regards the subject of this letter.

Winnipeg.

GEORGE PATERSON.

### THE BAR DINNER.

To the Editor of the LAW JOURNAL:

SIR,—I disclaim at the outset an intention to comment on your notes on the dinner given under the auspices of the County of York Bar Association and the Osgoode Legal and Literary Society. I simply enter a protest against the action taken in this matter by the Osgoode Legal and Literary Society at its meeting on the 20th inst.

## CORRESPONDENCE—FLOTSAM AND JETSAM.

At the meeting referred to, Mr. Nesbitt, the president of the Society, read from a manuscript what he assured the members was a fair summing-up of your comments on the dinner above mentioned. This "summing-up" very naturally caused much indignation among those present, the outcome of which was a very strongly-worded resolution expressive of the Society's dissent and condemnation of your remarks, in so far as they reflected upon it and its American guest. I have since read your remarks, and I must say that Mr. Nesbitt's "summing-up" was altogether too highly coloured, although, doubtless, so done under the influence of an unconscious bias. Had I previously read your comments I should certainly have opposed the adoption of the resolution condemning them.

But, in my opinion, the most objectionable part in the Society's action was the causing its fiery resolution to be published in the lay press. This I did oppose, but I had the honour of doing so as a minority of one. I pointed out that the dinner which gave rise to your comments was an exclusively professional one, that the criticisms complained of had been published in a professional journal, that it would be unprofessional to appeal to an *extra-professional* constituency, and, after the manner of the clerical profession, to wash our dirty linen before the "*profanum vulgus*."

As a member of the Osgoode Legal and Literary Society I regret exceedingly that it should have forgotten what is due to the dignity of the honourable profession to whose robes (as it were) it is clad.

M. J. FLETCHER.

Toronto, Feb. 22nd, 1886.

### BAILING PERSONS CONVICTED OF FELONY.

To the Editor of the LAW JOURNAL:

Sir,—At the last Assizes in Toronto a merchant of some prominence was found guilty of uttering forged paper. His criminal operations were carried on to a large extent and under circumstances which indicated both ingenuity and premeditation. The jury recommended him to mercy; why, it is very difficult to see. Some points of law were raised and sentence was deferred until they should be determined. In the meantime the prisoner was at liberty to appear when called upon; his own recognizance being taken in \$3,000, which is, presumably, of no great value, and two sureties in half the amount each. I do not feel called upon to criticize the discretion of the learned and com-

mon-sense judge who tried the case, except to remark that it may hereafter be used as a dangerous precedent. The offence is a very serious one, striking at the root of commercial confidence, and the judge himself very properly remarked that offences of the kind should be, and would therefore, by him at least, be visited with heavy penalties. Though there were points of law which may have been well taken they cannot be said to be at first sight very strong, and there was no doubt in any one's mind of the prisoner's guilt. But, however this may be, he *was* found guilty, and it does not seem to me to be in the interests of commercial morality that the prisoner should be allowed for the present to be going about his business as though he had done nothing very much amiss after all.

Yours, etc.,

BARRISTER.

[In the case referred to, although the jury found a verdict of guilty, their recommendation to mercy was (as it often is) probably made in order to get all the jurors to agree to a unanimous verdict, and was consequently of no value. There were strong doubts whether the facts justified the accusation on legal grounds. It is not usual for a judge, in such circumstances, to exact bail by sureties and penalties in case of the non-appearance of the accused to receive sentence at a subsequent assize; or where there is every or any probability that the Court on a case reserved will hold that the necessary ingredients to constitute a criminal offence have not been made out. The jury, no doubt, were influenced by the moral wrong exhibited by the acts of the prisoner in the case referred to; but the Court administering criminal law can only treat that as an offence which is not only *contra bonos mores*, but amounts to either felony or misdemeanour.—ED.]

### FLOTSAM AND JETSAM.

AN odd decision comes from Cockermouth County Court. It seems that one Scraggs bet a hat with a friend named Kirkwood, and lost. Scraggs told Kirkwood to buy his hat at Waite's, at Workington, but he preferred to buy it at Boyle's, the plaintiff's. When, therefore, the plaintiff asked Scraggs to pay, he declined. We suppose that if a man authorizes another to buy a hat at a shop he must pay for it, although the hat was lost in a wager, but not if he is told to buy it at Waite's and he buys it at Boyle's. The County Court judge, however, thought that, as the defendant's only reason for preferring Waite's was that she was a widow, and sold cheap hats, he might just as well have authorized the purchase at Boyle's. The only difficulty about this is that he did not.

## FLOTSAM AND JETSAM—LAW SOCIETY OF UPPER CANADA.

## SHELLEY'S CASE.

"I shall not say much about the rule in Shelley's case. I have heard some judges say that, in their opinion, it was the most unjust decision ever come to."—Lord Esher, M.R., Law Reports, Q. B. D., vol. 16, p. 104.]

*The SHADE OF FEARNE (on Contingent Remainders) loquitur.*

"A most unjust decision." Good heavens! is all precision.

All subtle fine acumen, to be swept at once away?  
Are the doctrines which delighted Bruce and Kenyon to be slighted,

And the flowers of learning blighted which have bloomed for many a day.

Shall each innocent Remainder now suffer an attainer,

Each patient calm Reversion wait no more its destined hour?

E'en the lovely springing Uses be considered but abuses?

Oh, ye sacred legal Muses! have ye lost your ancient power?

In the new age that is dawning shall be heard a voice of mourning

From many a dying beauty, for which men of old have fought;

Each weeping Term attendant, once so radiant and resplendent,

Like a beaten pale defendant, shall shudder out of court.

Men whose god is in their belly may despise the rule in Shelley,

Laugh to scorn the ancient learning which a Coke did once adore,

But their furious innovation will hurry to damnation  
The glorious British nation with a law no longer lore.

Yet, tho' Parliament may say, "An estate for life to A,

With the same to B to follow, then to A his lawful heirs

Shall be naught but an estate for life," the truth is great,

Or is not, at any rate, what a Parliament declares.

In higher worlds than this A shall have his lawful bliss

To dispose of what is his where no earthly courts restrain,

While in lowest pits of hell disappointed heirs shall yell

And confess that the rule in Shelley must for evermore obtain.

B. H. H.

—From *Pump Court*.

PRINTERS' errors sometimes make queer havoc of a sentence, for instance, the transposition of a line leads to the following curious result in the report of the case of *Bailey v. Lloyd*, 5 Russ. at p. 332:—"In 1815, Mr. Vokins and his wife had been long dead, Mr. and Mrs. Lloyd had had nine children of whom, seven being about to intermarry with the plaintiff Arthur Bailey, etc."!

## Law Society of Upper Canada.

## SUBJECTS FOR EXAMINATIONS.

*Articled Clerks.*

- |                      |   |  |
|----------------------|---|--|
| 1884<br>and<br>1885. | { | Arithmetic.                                |
|                      |   | Euclid, Bb. I., II., and III.              |
|                      |   | English Grammar and Composition.           |
|                      |   | English History—Queen Anne to George III.  |
|                      |   | Modern Geography—North America and Europe. |
|                      |   | Elements of Book-Keeping.                  |

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

*Students-at-Law.*

- |       |   |  |
|-------|---|--|
| 1884. | { | Cicero, Cato Major.                      |
|       |   | Virgil, <i>Æneid</i> , B. V., vv. 1-361. |
|       |   | Ovid, <i>Fasti</i> , B. I., vv. 1-300.   |
|       |   | Xenophon, <i>Anabasis</i> , B. II.       |
|       |   | Homer, <i>Iliad</i> , B. IV.             |
| 1885. | { | Xenophon, <i>Anabasis</i> , B. V.        |
|       |   | Homer, <i>Iliad</i> , B. IV.             |
|       |   | Cicero, Cato Major.                      |
|       |   | Virgil, <i>Æneid</i> , B. I., vv. 1-304. |
|       |   | Ovid, <i>Fasti</i> , B. I., vv. 1-300.   |

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.  
Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography Greece, Italy and Asia Minor. Modern Geography North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar,  
Translation from English into French prose.  
1884—Souvestre, Un Philosophe sous le toits.  
1885—Emile de Bonnechose, Lazare Hoche.

## LAW SOCIETY OF UPPER CANADA

## OF NATURAL PHILOSOPHY.

*Books*—Arnett's elements of Physics, and Somerville's Physical Geography.

*First Intermediate.*

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

*Second Intermediate.*

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

*For Certificate of Fitness.*

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

*For Call.*

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission to the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchers, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six

## LAW SOCIETY OF UPPER CANADA.

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchler, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## F E E S .

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above .....	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

## PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890.

*Students-at-law.*

## CLASSICS.

1886.	Cicero, Cato Major.
	Virgil, Æneid, B. I., vv. 1-304.
	Cæsar, Bellum Britannicum.
	Xenophon, Anabasis, B. V.
1887.	Homer, Iliad, B. VI.
	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. VI.
	Cicero, In Catilinam, I.
1888.	Virgil, Æneid, B. I.
	Cæsar, Bellum Britannicum.
	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. IV.
1889.	Cæsar, B. G. I. (vv. 1-33.)
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. I.
	Xenophon, Anabasis, B. II.
1890.	Homer, Iliad, B. VI.
	Cicero, In Catilinam, II.
	Virgil, Æneid, B. V.
	Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

## MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

## ENGLISH.

A Paper on English Grammar. Composition.

Critical reading of a Selected Poem:—

1886—Coleridge, Ancient Mariner and Christabel.

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

## HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

## FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886

1888 } Souvestre, Un Philosophe sous le toits.

1890

1887 } Lamartine, Christophe Colomb.

1889

## OF, NATURAL PHILOSOPHY.

Books—Arnot's Elements of Physics; or Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

## ARTICLED CLERKS.

Cicero, Cato Major; or, Virgil, Æneid, B. I., vv. 1-304, in the year 1886: and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, or Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe. Elements of Book-Keeping.

Copies of Rules can be obtained from Messrs. Rowse & Hutchison.

# Canada Law Journal.

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MARCH 15, 1886.

No. 6.

## DIARY FOR MARCH.

- 17. Wed...St. Patrick's Day.
- 18. Thur...Arch. McLean, 8th C. J. of Q. B., 1862.
- 19. Fri.....P. M. Vankoughnet, 2nd Chancellor, 1862.
- 20. Sat.....Lord Mansfield died 1773, æt. 89.
- 21. Sun.....2nd Sunday in Lent.
- 22. Thur...Lady Day, or Annunciation of B. V. Mary.
- 23. Sun.....3rd Sunday in Lent. Lord Romilly app. M.R., 1851.
- 30. Tues...B. N. A. Act assented to, 1867. Reformation in England began 1534.

TORONTO, MARCH 15, 1886.

AN old and valued correspondent, one of the best of our County Court judges, sends us the correspondence which took place between him and a person who desired to be appointed a commissioner for taking affidavits in his county. We publish the letters in another place. The correspondence contains food for thought for some other county judges, as well as for the justices of the High Court, on the subject therein referred to. If commissions were only granted to professional men (except under very peculiar circumstances) much injustice would be prevented.

It seems very strange that those who are specially appointed to protect the interests of their brethren are either too regardless of their duties in this respect, or are otherwise unable to suggest anything to protect the fee-paying lawyer from the depredations of the ignorant, unlicensed harpies who are taking the bread out of the mouths of those who have a clear right to be protected. Perhaps if we had a few more men as benchers from the ranks of the solicitors and a few less leading counsel it might

be an advantage. The latter, so long as their fees are paid by the solicitors who employ them, do not feel the shoe pinch, and are either forgetful or careless (perhaps both) of the struggles of country practitioners and the injustice to which they are subjected.

It is a constant and recurring source of astonishment that the Attorney-General on the one hand (whose duty it ought to be), and the leader of the opposition on the other (who ought to call him to account), take no action in this matter. We presume they would lose some votes if they did the honest thing in the premises; and thus the rights of the profession are sacrificed on the party altar. We are constantly receiving letters on this subject, and publish some of them in this issue. We, at least, have not ceased to call attention to the wrong done. Numerous suggestions have been made, some of which are surely feasible. We add another, extracted from a letter now before us: Let the Legislature establish a tariff of fees which would satisfy the public, and make all persons who do conveyancing obtain certificates of qualification from the Law Society. We do not say this is the best suggestion; we only plead with those in authority to do *something*. There is a story of two shipwrecked sailors which is somewhat in point, though we doubt its authenticity. Death was imminent. Human aid seemed impossible. An appeal for Divine assistance by prayer or hymn came not to their uncircumcised lips; but something had to be done, and so they took comfort in the suggestion of "taking up a col-

## ELEMENTS OF JURISPRUDENCE—RECENT ENGLISH DECISIONS.

lection." We concur in the admitted imbecility of the trustees of the profession in this matter, but perhaps they might summon sufficient energy to take up a collection for those whose interests they neglect.

WE are glad to have received the third edition of Mr. Holland's well-known work on Jurisprudence.\* In it the author tells us he has throughout taken account of the development both of positive law and of legal theory in England and other countries during the last three years. The book has acquired far too excellent a reputation to need any special words of commendation now. It is impossible for any lawyer to read it without getting his ideas upon the fundamental principles of law very much systematized and made more clear and exact. The whole field of law is traversed by the author, and is divided and subdivided in such method as, in his view, best exhibits the scientific order of legal ideas. The work is, and has been, since its first publication, a leading text-book on the curriculum of the jurisprudence school at Oxford, and we would submit to the Benchers of the Law Society that it might advantageously be included among the books required to be read on the final examinations. Sir Henry Maine's works are of very different scope and object, dealing with the historical development of legal ideas and institutions, on which Professor Holland touches but slightly. Holmes on the Common Law again occupies a field of labour more akin to that of Sir Henry Maine than of the work before us. Amos' Systematic View of the Science of Jurisprudence, indeed, deals with the relations between legal ideas, but we

fancy no one would compare the mental benefit to be derived from the perusal of the two works respectively: Austin is discursive, and, moreover, fragmentary and incomplete, and we know of no worker in the same field who has produced anything so valuable and able as these Elements of Jurisprudence by Professor Holland.

## RECENT ENGLISH DECISIONS.

The *Law Reports* for January comprise 16 Q. B. D. pp. 1-116: 11 P. D. pp. 1-13; 31 Chy. D. pp. 1-119; there are not, however, many cases requiring notice.

## SOLICITOR AS WITNESS—PRIVILEGE—HOW FAR SOLICITOR BOUND TO DISCLOSE CLIENT'S NAME.

Commencing with the cases in the Queen's Bench Division the first to be noted is *Bursill v. Tanner*, 16 Q. B. D. 1. In this case judgment had been signed against a married woman, and an inquiry directed whether she was possessed of any separate estate. The solicitor to the trustees of her marriage settlement was called as a witness by the plaintiff on this inquiry, and stated that the deed of settlement was in his possession as solicitor to the trustees, but he objected to state the names of the trustees, or produce the deed, on the ground of professional privilege. Smith, J., had made an order in Chambers overruling the solicitor's objections. The solicitor appealed to the Divisional Court, which affirmed Smith, J., and the present decision is upon a further appeal by the solicitor to the Court of Appeal. The Court of Appeal affirmed the Court below. Cotton, L.J., says:

The privilege only extends to confidential communications. . . . In my opinion the names of the trustees did not constitute such a communication. . . . There is also another ground for compelling the disclosure of their names. The solicitor claims this privilege as that of his clients. He must then state the names of the persons for whom he claims the privilege.

As to the production of the deed, Lord Esher, M.R., says:

Though there may be no case that exactly decides the point, yet many cases seem to assume that

\* "The Elements of Jurisprudence," by Thomas Erskine Holland, D.C.L., Clinbele Professor of International Law and Diplomacy, and Fellow of All Souls College, Oxford, Third edition. Clarendon Press, 1886.

## RECENT ENGLISH DECISIONS.

their can be no such privilege, unless the client could refuse to produce the deed.

As Lindley, L.J., observes, very justly, if the law were otherwise than it is decided to be in this case, "judgments in favour of creditors against married women would, in many cases, be useless."

**AFFIDAVIT OF SERVICE—WRIT SERVED OUT OF JURISDICTION.**

In *Ford v. Miescke*, 16 Q. B. D. 57, a Divisional Court held, that where a writ is served out of the jurisdiction, a certificate of service of the process could not be received in lieu of an affidavit of service, even though it appeared that by the law of the country where the service was effected, the process server could not make an affidavit as required by the Rules.

**RULE IN SHELLEY'S CASE—EQUITABLE ESTATE—REMAINDER—POWER OF SALE.**

What the Statute of Frauds is in the law of contracts, such is the rule in Shelley's case, in the law of real estate—a perennial fountain of litigation. *Richardson v. Harrison*, 16 Q. B. D. 85, is a decision of the Court of Appeal touching the rule in Shelley's case. By a will made in 1833 a testatrix devised lands to trustees in fee, upon trust for her daughter during her life, and after her decease upon such trusts for the lawful child or children of the daughter as she should by deed or will appoint; and in default of appointment in trust for the daughters' heirs. The testatrix directed that the receipts of the daughter should be a discharge to the trustees, and that she should hold the property to her separate use, free from the debts or control of any husband she might marry. The trustees were also empowered to sell the land with the consent of the daughter, "or other the persons or person who shall be beneficially interested under the trusts." The daughter, after her mother's death, conveyed the land to the defendant in fee, and died without having been married. The action was brought by her heir-at-law to recover possession of the land. The Court of Appeal (overruling the judgment of a Divisional Court composed of Manisty and Wills, JJ.) held that the daughter, under the rule in Shelley's case, took a fee. It is curious to note, the various opinions which modern judges entertain with regard to the merits of this rule.

In the present case Lord Esher, M.R., goes so far as to say that it is a decision which he could never understand how anybody could come to.

It is a well-known doctrine that in order that the rule can operate, the two estates which are sought to be joined together, must be both legal, or both equitable. A legal estate for life will not coalesce with an ultimate equitable remainder in fee, nor will an equitable estate for life coalesce with a legal remainder in fee, and the question in this case was whether the ultimate remainder in fee of the daughter was a legal or equitable estate; if the former, the rule in Shelley's case would not apply; if the latter, it would, as it was conceded the daughter's life estate was an equitable one. In arriving at the conclusion that the legal estate was vested in the trustees, and that consequently the daughter's remainder in fee was equitable, the Court was influenced by the consideration that the will gave the trustees power to reimburse themselves, and also a power of sale, which power could not be exercised without possession of the legal estate. But Cotton, L.J., dealt with the question as turning to a great extent upon the intention of the testatrix to be collected from the will. He says, at p. 108:

The question generally is, whether in the will it is apparent that the testator intended the trustees to have the legal estate for any limited period, or for all time? On this ground, in construing wills, what has been done is this, to give the legal estate in accordance with what the Court sees is the intention of the testator; therefore, when there are words of trust or words of devise to trustees to uses or upon trusts, the Court executes the uses or the trusts, not by force of the Statute of Uses, but by giving the legal estate to the trustee or to the beneficiary according to what the Court sees to have been the intention of the testator.

**DEFAMATION—PRIVILEGED COMMUNICATION.**

The only remaining case to be noticed in the Queen's Bench Division is that of *Proctor v. Webster*, 16 Q. B. D. 112, in which Pollock, B., and Manisty, J., decided that a letter addressed by the defendant to the Lords of the Privy Council, charging the plaintiff with irregularities in the exercise of his office as Inspector under the Animals Contagious Diseases Act, the plaintiff being removable by the Privy



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Council, was actionable on proof of express malice in the defendant, and was not privileged.

## ALIMONY—INJUNCTION.

The only case in the Probate Division which seems to call for attention is *Newton v. Newton*, 11 P. D. 11, which was a suit by a wife for restitution of conjugal rights. The plaintiff applied for an interim injunction to restrain the defendant, her husband, from removing his property out of the jurisdiction, pending a motion for payment of interim alimony. The injunction was refused, Sir Jas. Hannen saying that "it is not competent for a Court, merely *quia timet*, to restrain a respondent from dealing with his property."

## SECURITY FOR COSTS—INSOLVENT TRUSTEE IN BANKRUPTCY.

Taking up now the reports of the Chancery Division, the first case we think it necessary to call attention to is *Cowell v. Taylor*, 31 Chy. D. 34, in which the Court of Appeal held that a plaintiff suing as trustee in bankruptcy will not be required to give security for costs, merely because he happens to be personally insolvent. The only difficulty in the case arose from a dictum of Blackburn, J., than whom, as Bowen, L.J., says, "there has been no greater master of law or practice in recent times," and which occurs in *Malcolm v. Hodgkinson*, 8 Q. B. 209, and which is as follows: "When an insolvent person is suing as trustee for another it has long been the rule to require security for costs," but this, the Court was unanimously of opinion, must be understood as referring not to trustees in bankruptcy, but to the case of an insolvent person suing as bare trustee for some one else, which was the explanation given of it by Hall, V.C., in *In re Carta Para Mining Co.*, 19 Chy. D. 457.

## MORTGAGE—COSTS OF ABORTIVE SALE—FORECLOSURE—PERSONAL ORDER FOR PAYMENT.

In *Farrer v. Lacy*, 31 Chy. D. 42, the Court of Appeal was called on to determine two points; first, whether a mortgagee was entitled to the costs of an abortive sale under the following circumstances:—The mortgaged property had been put up at auction and sold, and the auctioneer, with the concurrence of the mortgagee, accepted a cheque for the deposit, which, on presentation, was dishonoured, in consequence of which the sale

fell through. The Court held that the acceptance of the cheque was not such an act of negligence as to disentitle the mortgagee to the costs. The other question was as to the proper form of a judgment where a mortgagee claims both foreclosure and a personal order for payment on his covenant. The form settled seems substantially to agree with that usual in this Province, with this exception, that the personal order for payment of costs is limited to such costs only as would have been incurred if the action had been brought for payment only of the debt.

## PAYMENT INTO COURT—ADMISSION BY DEFENDANT.

In *Porrett v. White*, 31 Chy. D. 52, the Court of Appeal affirmed the order of Chitty, J., directing the payment into Court of certain trust funds, admitted by the defendant to have come to his hands, and been invested by him in an unauthorized way. The admission was contained in letters written to the plaintiff, his co-trustee before action. After the action for the administration of the trusts was commenced, the plaintiff made an interlocutory application for payment of this sum into Court, adducing in support of the application the defendant's admission, as the defendant did not answer the affidavit or adduce any evidence, the Court held, that the order was rightly made.

## HEARING IN PRIVATE.

*Millar v. Thompson*, 31 Chy. D. 55, is a case in which the plaintiff asked that an appeal by the defendant, from an interlocutory injunction restraining him from disclosing matters communicated to him as solicitor, might be heard in private. It being stated by the plaintiff's counsel, that in his opinion a public hearing would defeat the object of the action, although the defendant's counsel refused to consent, the Court under the circumstances ordered the appeal to be heard in private.

## EXONERATION OF PERSONALTY FROM DEBTS—LAPSED REQUEST.

*Kilford v. Blainey*, 31 Chy. D. 56, which we noted *ante*, Vol. xxi. p. 268, when before Bacon, V.C., is again reported on appeal from that decision. It will be remembered that the question in dispute was as to the effect of a will, whereby the testatrix bequeathed her personal estate to a charity, exonerating it from payment of debts and legacies. As to part of the per-

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sonal estate, which savoured of realty, the bequest to the charity failed, and went to the Crown for want of next of kin. The question was whether the exoneration of the personalty applied to that portion of the bequest which went to the Crown, and Bacon, V.C. held that it did not; but the Court of Appeal, refusing to follow *Broom v. Groombridge*, 4 Madd. 495, varied the order of the Vice-Chancellor by directing that the debts should be apportioned between the pure and impure personalty, and that the freehold and leasehold estates specifically charged with payment of debts and legacies, should be applied in exoneration of the pure personalty, and declaring the Crown entitled to the impure personalty less the proportion of debts, etc., thrown upon it.

## AMENDMENT—NEW CASE—DELAY.

*Clark v. Wray*, 31 Chy. D. 68, was an action for specific performance of an agreement to grant the plaintiff, who was in possession, a lease of a brickfield. The defendant delivered a defence admitting the agreement, and expressing his readiness to perform it; he also counter-claimed for rent alleged to be due under the agreement, and for labour and materials supplied the plaintiff. Three months after issue joined, and after notice of trial served, the defendant applied to amend by adding a claim for the recovery of the land; but Bacon, V.C., refused the amendment, on the ground of the amendment asked being substantially a new case, and also on the ground of delay.

## WILL—GIFT TO HUSBAND OF ATTESTING WITNESS—ACCELERATION OF INTERESTS.

*In re Clark*, *Clark v. Randall*, 31 Chy. D. 72, is a decision of Bacon, V.C. A testator devised and bequeathed all his real and personal property to his wife for life, and after her death to be divided between such of his children as should be living at her death, and in case of any of his children predeceasing his wife, leaving issue, such issue were to take their parent's share, and in the event of any of his daughters being married at his wife's decease, such portion as they might be entitled to was left to them and their children exclusively, and to be in no way controlled by their husbands. At the death of the testator's widow one of his daughters was living who had several

children. Her husband was an attesting witness to the will, and consequently the gift to her was void under s. 15 of the *Wills Act* (see R. S. O. ss. 16, 17). The question was, whether the gift in favour of her children was thereby accelerated? and Bacon, V.C., held that it was.

## GIFT IN REMAINDER—REMAINDERMAN PREDECEASING TENANT FOR LIFE.

*In re Noyce*, *Brown v. Rigg*, 31 Chy. D. 75, is another decision of Bacon, V.C., on the construction of a will, whereby a testatrix gave three houses to E. for life, and after his death directed that they should be sold, and the proceeds to be equally divided amongst her three nephews and niece, but should either of the nephews or niece "die before they are entitled to the property, leaving issue," she gave the share of him or her so dying to his or her children. All the remaindermen survived the testatrix, but three of them predeceased E. leaving children who survived him. The question in dispute was whether the children of the deceased remaindermen or the personal representatives of the latter were entitled to the fund, and this turned on the meaning to be attributed to the words "die before they are entitled." Did it mean die before entitled "in right," or "in possession"? The learned judge came to the conclusion that they meant "entitled in possession," and that therefore, the children took in preference to the personal representatives.

## MORTGAGOR AND MORTGAGEE—INTEREST IN LIEU OF NOTICE—ORDER FOR PAYMENT OF MORTGAGE OUT OF FUND IN COURT.

*In re Moss*, *Levy v. Sewill*, 31 Chy. D. 90, a mortgagor gave six months' notice to his mortgagee of payment off of the mortgage on July 1, 1885. On May 20, 1885, an order was made with the concurrence of the mortgagees for payment of the mortgage out of a fund in Court, with interest up to July 1, 1885. Owing to delay in the completion of the order, the payment could not be made on July 1; and on July 2, the mortgagees applied for payment of six months' additional interest in lieu of a fresh six months' notice to pay off the mortgage. On July 20 the order was completed, and on July 21 the mortgagors took the sum mentioned in the order out of Court. Pearson, J., under these circumstances, held that the

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mortgagees by accepting the order assented to the payment out of the fund, subject to any delay which might arise in the completion of the order, and therefore, were only entitled to the additional interest up to July 21, 1885.

## DIRECTORS—BREACH OF TRUST—CONTRIBUTION.

Several points of interest were decided by Pearson, J., in *Ramskill v. Edwards*, 31 Chy. D. 100, affecting the liabilities of directors *inter se*, who concur in breaches of trust. The action was brought by 'a director against several co-directors, to compel them to contribute to the payment of moneys which had been recovered against the plaintiff for breaches of trust, in which he alleged the defendants had concurred. In the first place it was held, that a director who had not been present when an improper loan had been sanctioned by the board, but who, after the money had been advanced, attended a meeting, at which the minutes of the meeting which sanctioned the loan were confirmed, was not liable to his co-director to contribute in respect of such loan: but that the same defendant having been present at a meeting, at which another improper loan was proposed, and against which he protested, was liable to make contribution in respect of it, because he had attended a subsequent meeting, at which the minutes were confirmed, and signed a cheque for part of the improper loan. Another point determined was that where one of the directors liable to make contribution, who had been made a defendant, died after the commencement of the action, the cause of action survived against his personal representative.

## ADMINISTRATION—CHARGE OF LEGACIES ON REAL ESTATE—GIFT TO CHARITY.

In *re Ovey, Broadbent v. Barrow*, 31 Chy. D. 113, turns upon the construction of a will. The testator after directing his executors, (whom he also appointed trustees) to pay his debts and funeral expenses, and giving various pecuniary legacies, gave all his personal estate and effects, except money or securities for money to R., and he gave and devised the residue of his estate, real and personal, to his trustees, upon trust to pay two specified sums, and the residue for such one, or more, or any hospital of a charitable nature, and in such proportions as they in their uncontrolled discretion should think fit. The Court of

Appeal had held that the gift to R. was not specific, but that all the pecuniary legacies must be paid before she would be entitled to anything. And Pearson, J., now held, although the whole personal estate was insufficient for the payment of legacies, and the realty had to be sold to make good the deficiency, R. was not entitled to be recouped out of the surplus proceeds of the realty for the amount of the personalty bequeathed to her which had been applied in the payment of legacies. He also held, that the trustees were entitled to appropriate the surplus to hospitals, which were authorized to take land by devise; the case on this point accords with *Anderson v. Dougall*, 13 Gr. 164.

The February numbers of the *Law Reports* comprise 16 Q. B. D. pp. 117-304, and 31 Chy. D. pp. 119-250.

## LANDLORD AND TENANT—COVENANTS.

Commencing with the cases in the Queen's Bench Division the first to be noted is *Edge v. Boileau*, 16 Q. B. D. 117, which was an action by a lessee against his lessors for breach of a covenant for quiet enjoyment contained in a lease. The covenant was in the usual terms, viz., that the lessee, paying his rent and performing his covenants, should quietly enjoy the premises without interruption from the lessors. There were covenants by the lessee to pay rent, and repair. The rent being in arrear, and the premises out of repair, the lessors caused notice to be served on the lessee's sub-tenants, requiring them not to pay their rents to the lessee but to themselves, and threatening legal proceedings in default of compliance. The lessors, though requested to do so, refused to withdraw the notice for several weeks, and some of the sub-tenants paid their rents to the lessors. A verdict was found for the plaintiff, and the case came before the Divisional Court on a motion by defendants for a new trial, or to enter judgment for them, on the ground that there was no evidence of any breach of the covenant, because the covenant was conditional on the plaintiff performing his covenants. But on the authority of *Dawson v. Dyer*, 5 B. & Ad. 584, the Court (Pollock, B., and Manisty, J.,) held that the covenants were independent, and that the plaintiff was entitled to recover.

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**PRACTICE—PRODUCTION BY CO-DEFENDANT.**

In *Brown v. Watkins*, 16 Q. B. D. 125, Matthew and Smith, JJ., held that under the English Rules a defendant is not entitled to an order for discovery of documents against a co-defendant. In this Province it was held in *Brigham v. Bronson*, 3 C. L. T. 311, that a defendant is entitled to an order for production against a co-defendant who is in the same interest as the plaintiff.

**EMBEZZLEMENT—CO-PARTNERSHIP MONIES—SOCIETY FOR MUTUAL IMPROVEMENT.**

The *Queen v. Robson*, 16 Q. B. D. 137, was a criminal prosecution for embezzlement of co-partnership moneys. The moneys in question were the property of the Bedlington Colliery Young Men's Christian Association, and it was held that the association was not a "co-partnership," and the conviction of the prisoner was therefore quashed.

**COMPOUNDING A LARCENY.**

A Court composed of Coleridge, C. J., and four *puisne* judges, held, in *The Queen v. Burgess*, 16 Q. B. D. 141, that it is a criminal offence for a person who is neither the owner of the stolen goods, nor a material witness for the prosecution, to make any agreement with a view to compounding the offence, and that the offence is completed by entering into any such agreement, and the compounder is not exonerated, even though the delinquent is subsequently prosecuted to conviction.

**AMENDMENT OF DEFENCE—PREJUDICE TO PLAINTIFF.**

In *Steward v. The Metropolitan Tramways Co.*, 16 Q. B. D. 178, Pollock, B., and Manisty, J., refused to permit an amendment of a defence. The action was brought to recover damages against defendants for allowing their tramway to remain in a defective and unsafe condition. The defendants by their defence denied negligence. More than six months after the delivery of their defence they applied to amend it by adding an allegation that by an agreement the liability to maintain the roadway had previously to the cause of action been transferred to the local authority. But the local authority was entitled to six months' notice of action and the time for giving it had expired, and the remedy against them, if any, was lost; and as plaintiff would be prejudiced by the allowance of the amendment under the circumstances, it

was refused. See *Clark v. Wray*, 31 Chy. D. 68, noted *ante*, p. 97.

**ORDER FOR TRIAL OF ONE QUESTION BEFORE ANOTHER—O. 80, R. 8 (ONT. RULE 256).**

*Smith v. Hargrave*, 16 Q. B. D. 183, was an appeal from an order made under Ord. 36, r. 8 (Ont. Rule 256) directing a question of negligence to be first tried, and the question of damages to be postponed until afterwards. The amount of damages being a matter of detail, which would probably be referred to some other tribunal than a jury, the Court (Pollock and Manisty, JJ.) held the order rightly made under the circumstances and dismissed the appeal.

**LARCENY—MUTUAL MISTAKE—SUBSEQUENT FRAUDULENT APPROPRIATION.**

The only remaining case to be noticed in the Queen's Bench Division is that of *The Queen v. Ashwell*, 16 Q. B. D. 190, which, besides deciding a curious point of criminal law, exhibits also the extraordinary care taken in England in settling any doubtful questions of criminal law as they arise. The case was argued first before five judges who differed in opinion, and it was then re-argued before no less than fourteen judges, and in the end they were equally divided in opinion. The question which gave rise to this extraordinary difference of opinion was a very simple one, so far as the facts were concerned. The prisoner asked the prosecutor for the loan of a shilling. The prosecutor gave the prisoner a sovereign, believing it to be a shilling, and the prisoner took the coin under the same belief. About an hour afterwards he discovered the coin was a sovereign, and, instead of returning it to the prosecutor, he kept it and spent it. The Court seems to have been unanimous that the prisoner was not guilty of larceny as a bailee, but Smith, Matthew, Stephen, Day, Wills, Manisty and Field, JJ., held he was not guilty of larceny at common law; while Coleridge, C.J., and Cave, Hawkins, Denman and Grove, JJ., and Pollock and Huddleston, B.B., held that he was. Denman, J., tried the case, and the prisoner having been convicted at the trial the conviction was affirmed.

In this country, whatever doubt may exist as to the offence in question being larceny, there can be no doubt that it would at all events be punishable as a misdemeanor under sec. 110 of the *Larceny Act*.

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**WILL—GIFT OVER TO HEIR OF DEVISEE IN FEE, ON THE LATTER DYING WITHOUT LEAVING ISSUE.**

Taking up the cases in the Chancery Division, the first that calls for notice is *In re Parry and Daggs*, 31 Chy. D. 130, which was an application under the Vendor and Purchaser Act. The question submitted for the consideration of the Court was the effect of a will, whereby the testator devised real estate to his son and his heirs; and then declared that in case his said son should die without leaving lawful issue, then, and in such case, the estate should go to his son's next heir-at-law, to whom he gave and devised the same accordingly. The son having no living issue, contracted to sell the estate to Daggs, who objected that he was tenant in fee simple, subject to an executory devise over on his death without issue, but Bacon, V.C., held he was tenant in fee, and that the devise over was repugnant and void; and this decision was affirmed by the Court of Appeal. Fry, L.J., who delivered the judgment of the latter Court, held that the devise over was an attempt to render the estate inalienable in the hands of the son, who was tenant in fee, and was an illegal device, and therefore void. He sums up the conclusion of the Court as follows:

In the present case the testator's son is devisee in fee, and on his death, either one of his issue will be his heir, or some one else. If his heir be his issue, such issue will take under the original devise, and the gift over does not arise: if his heir be some one not his issue, such heir would take equally under the original devise, and under the gift over; so that the operation of the gift over, if it be valid, is not to alter the devolution of the estate, but only to fetter the power of alienation during the lifetime of the son. That was an illegal device, and consequently the gift over is void.

**INFANT TRUSTEE—FORM OF DECREE FOR ACCOUNT.**

*In re Garnes*, *Garnes v. Applin*, 31 Chy. D. 147, was a suit for an account against a trustee who had received moneys of the trust whilst an infant, and the question was simply as to the proper form of the judgment in such a case. Bacon, V.C., considered the account should be limited to moneys and properties received since the trustee attained twenty-one. But the Court of Appeal, without determining any question as to the liability of the trustee for his receipts before he attained twenty-one, directed the judgment to be varied by directing the account to be taken of all moneys and

property of the trust received by the trustee in question, and of his dealings and transactions in respect of the same, and an inquiry as to the dates of, and circumstances attending, such receipts, dealings and transactions.

**ASSIGNEE OF MORTGAGE—ESTOPPEL AS TO AMOUNT SECURED.**

*Bickerton v. Walker*, 31 Chy. D. 151, is an important decision of the Court of Appeal, and illustrates the importance which is attached to a receipt for the consideration endorsed on a deed. On the 10th Feb., 1879, the plaintiffs mortgaged to B. for £250 their equitable interests in a sum of stock. By the mortgage deed they acknowledged the receipt of £250, and they also signed a receipt therefor endorsed on the mortgage deed. B. actually advanced only £91. On 11th March, 1879, B. transferred the mortgage to H., who gave full value for it as a mortgage for £250, and had no notice that the plaintiffs had not received that sum. The plaintiffs brought the action, claiming to redeem on payment of £91, but Bacon, V.C., held that H. was entitled to hold the mortgage as security for £250, and the Court of Appeal affirmed his decision. A passage from the judgment of the Court, delivered by Fry, L.J., may be useful. After commenting on the ordinary rule that a prudent assignee of a mortgage before paying his money requires the concurrence of the mortgagor, or some information from him as to the state of the accounts between him and the mortgagee, and on the fact that in the present case the assignment of the mortgage was taken very shortly after its date, and before any money had become due on it, and that the assignee if he chose to run the risk of no subsequent payment having been made, could not be considered guilty of negligence in giving credence to the solemn assurance under the hand and seal of the mortgagor, and also to his receipt, endorsed on the mortgage, that the full amount of the mortgage money had been received, goes on to say at p. 159:

The presence of a receipt endorsed upon the deed for the full amount of the consideration money has always been considered a highly important circumstance. The importance attached to this circumstance seems at first sight a little remarkable, when it is remembered that the deed almost always contains a receipt, and often a release under the hand

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and seal of the parties entitled to the money. But there are circumstances which seem to justify the view which has prevailed as to its importance. A deed may be delivered as an escrow, but there is no reason for giving a receipt till the money is actually received, unless it be to enable the person taking the receipt to produce faith by it. A deed is not always, perhaps rarely, understood by the parties to it; but a receipt is an instrument level with the ordinary intelligence of men and women who transact business in this country, and which he who runs may read and understand.

**VENDOR AND PURCHASER—INTEREST ON PURCHASE MONEY—VENDOR AND PURCHASER ACT (R. S. O. c. 109).**

*In re Young and Harston*, 31 Chy. D. 168, was an application under the Vendor and Purchaser Act to determine the question whether a vendor who had left the country on a pleasure excursion about the time fixed for the completion of the purchase, whereby its completion was delayed, was thereby guilty of wilful default, and whether interest paid him on the purchase money during that period could be recovered back; the conditions of sale exonerating the purchaser from interest for any period of delay occasioned by the wilful default of the vendor. The Court of Appeal answered both questions in the affirmative. The question whether, under the V. and P. Act, the Court had jurisdiction to order the interest to be refunded, was taken in the Court below, and decided by Bacon, V.C., in the negative, but this point was waived on the appeal.

**PARTNERSHIP DEBT—RIGHT OF CREDITOR AGAINST ESTATE OF DECEASED PARTNER AND SURVIVING PARTNER.**

*In re Hodgson, Beckett v. Ramsdale*, 31 Chy. D. 177, is a decision of the Court of Appeal in which the difference between the legal and equitable rights of creditors against the surviving partner of a firm, and the estate of a deceased partner, is illustrated. The plaintiffs were creditors of a father and son who were in partnership. The son died, and the father obtained a judgment for administration of his estate, and the plaintiffs being then unable to establish a partnership between the father and son carried in a claim against the son's estate, and were declared entitled to a dividend. Afterwards the father died, and the plaintiffs, having obtained proof of the partnership,

brought an action to make his estate liable for the partnership debt. It was contended by the defendants on the authority of *Kendall v. Hamilton*, 4 App. C. 504, that the plaintiffs, by obtaining judgment against the son's estate, were precluded from having recourse to the father's estate; but the Court of Appeal (affirming Bacon, V.C.) held that the fact of the son being dead took the case out of the rule laid down in that case. Referring to *Kendall v. Hamilton*, Sir J. Hannen said that it had undoubtedly decided "that when some members of a firm, or some joint contractors are sued, and judgment is obtained against them, the matter then passes into *res judicata*, and it is to be treated thenceforth as a debt against those persons only against whom that judgment has been recovered, and recourse cannot be had to a person who was not joined in that action." But he goes on to point out that there is in equity an exception to that rule when one of the partners dies; and he goes on to quote with approval the statement of that doctrine of equity as laid down in *Kendall v. Hamilton*:

It is now well established that a Court of Equity does treat the estate of a deceased partner as still liable to the partnership creditors, though at law the survivor has become solely liable. And it must now be considered as established that the partnership creditor may obtain relief against the estate of the deceased partner without having exhausted his remedy against the survivor.

Applying that rule to the case in hand, the Court determined that the claim proved against the son's estate was no bar to the action against the father's estate; but they put the plaintiffs on an undertaking to postpone their dividend on the son's estate to the claims of his separate creditors.

**ADMINISTRATION—FOLLOWING ASSETS—LIMITATIONS.**

In *Blake v. Gale*, 31 Chy. D. 196, Bacon, V. C., had before him a somewhat nice question. A testator had died in 1859, indebted amongst others to the plaintiffs as mortgagees. From 1859 to 1880, the interest on the plaintiffs' mortgage was regularly paid out of the rents of the mortgaged estate. In 1861, the residuary estate of the mortgagors was sold and distributed among the residuary legatees by the executors, with the knowledge of the plaintiffs, and without objection on their part, and with-

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out making any provision for the payment of the plaintiffs' mortgage. In 1882, the plaintiffs' mortgage proved to be worthless, owing to the existence of a prior mortgage on the property. The plaintiffs then brought an action against the executors for a *devastavit* in paying over the residuary estate, but failed. The present action was brought to make the residuary legatees refund; but it was held that though the claim against the mortgagors' estate was not barred yet that the plaintiffs' claim against the residuary legatees, being in the nature of an equitable demand, was barred by lapse of time and acquiescence.

SPECIFIC PERFORMANCE—DEFAULTING PURCHASER—  
FORM OF JUDGMENT.

*Morgan v. Brisco*, 31 Chy. D. 216, is an action for specific performance by a vendor. The defendant having refused to tender the conveyance or complete the purchase according to the judgment of the Court, the question Bacon, V. C., was called upon to decide was as to the proper form of the judgment on further consideration in such a case. The judgment, as settled, authorized the plaintiff to prepare and execute a conveyance (as an escrow to be delivered to the defendant on payment of the purchase money), and directed the defendant to pay the purchase money at a time and place to be named, when the conveyance was to be delivered to him.

## NEXT FRIEND OF INFANT—TESTAMENTARY GUARDIAN.

In *Hutchinson v. Norwood*, 31 Chy. D. 237, an application was made to Pearson, J., to change a next friend under the following circumstances: The action had been commenced by infant plaintiffs in the lifetime of their father, who authorized a stranger to act as their next friend. Subsequently the father died, and by will appointed the mother of the infants their guardian. She now applied to be substituted as their next friend in this action, and the application was granted.

## NON-PAYMENT OF COSTS—STAY OF PROCEEDINGS.

In *re Youngs, Doggett v. Revett*, 31 Chy. D. 239, Pearson, J., held that the old rule of Chancery practice, that where a party is in default for non-payment of costs, further proceedings by him in the action will be stayed, until payment is still in force.

## PATENT—PRIOR PUBLICATION.

*Otto v. Steel*, 31 Chy. D. 241, is a patent case, in which it was sought to avoid a patent on the ground of alleged prior publication. The facts in support of the alleged prior publication were, that in 1863, a French treatise was placed in the British Museum Library, the Museum catalogue being kept with reference to authors' names, and the books being arranged according to subject-matter, and readers under guidance being able to search for books on particular subjects. But it was held by Pearson, J., that this was no prior publication in England of the matter contained in the treatise so as to avoid a patent taken out in 1876.

## NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

## QUEEN'S BENCH DIVISION.

IN BANCO.

## LEWEY V. CHAMBERLAIN.

*Libel—Privileged communication—Nominal damages—New trial refused.*

Defendant published of and concerning plaintiff, a business man, in a written circular called "Legal Record, Co. Renfrew," a statement meaning that plaintiff had given a chattel mortgage on his property, whereas he had only assigned a chattel mortgage held by him against another person.

*Held*, statement libelous, and not privileged. Jury having found no damages, rule *nisi* for new trial refused without costs.

*Delamere*, for motion.

*Arnoldi*, contra.

Q. B. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

## IN BANCO.

## MCKAY v. CRAWFORD ET AL.

*Malicious arrest—Order for arrest not set aside—  
Failure of action.*

In an action for malicious arrest, and in trespass for arrest,

*Held*, per ARMOUR and O'CONNOR, JJ., that the claim for malicious arrest could not be maintained, because the order directing the arrest had not been set aside. Per WILSON, C.J., it did sufficiently appear it had been set aside.

*Dickson*, Q.C., for motion.

*Osler*, Q.C., and *Burdett*, contra.

O'Connor, J.]

## REGINA v. GRAVALLE.

*By-law—Con. Mun. Act 1883, sec. 503,  
sub-sec. 6—Conviction quashed.*

By-law under sub-sec. 6, sec. 503, Con. Mun. Act 1883, and conviction thereunder,

*Held*, not bad, for not embodying or referring to the exceptional proviso as to time mentioned in sec. 500; for this sec. does not refer to the subject of sub-sec. 6, of sec. 503; and apart from that, sec. 500 is expressly limited to municipalities in which no market fees are imposed, whereas here there were such fees.

Such by-law is not *ultra vires*, express power being given, by sec. 503, to pass a by-law respecting the matter mentioned in sub-sec. 6; and

*Held*, that as the reasonable or unreasonable exercise of the power could only be entertained on a motion to quash the by-law, the objection was not open on this motion, which was to quash the conviction. But

*Held*, that the conviction was bad for imposing but one penalty while covering two several and distinct offences.

*Clement*, for motion.

*MacLennan*, Q.C., contra.

## CHANCERY DIVISION.

Boyd, C.]

[January 20.]

## MURPHY v. THE KINGSTON AND PEMBROKE R. W. Co.

*Consolidated Railway Act of 1879—42 Vict. c. 9,  
D.—Expropriation of land—Plans and book of  
reference—Limits of deviation.*

The defendants having in 1872 filed their plan and book of reference, under the Railway Act, showing their terminus at a certain point, and having built and used their line up to that point, desired in 1885 to extend their line about one third of a mile further on, and took proceedings to expropriate certain land required for that purpose, and possession having been refused, applied to a county judge for an order for immediate possession. In an action for an injunction to restrain the Company proceeding before the judge, on the ground that no new plan and book of reference showing the land required had been filed, and in which the Company contended that none were necessary as they were within the limits of deviation of one mile provided for by the statute. It was

*Held*, that deviation is a term not to be restricted to a lateral variance on either side of the line, but may mean a change *de via* in any direction within the prescribed limits whether at right angles to, or deflecting from or extending beyond the line.

*Britton*, Q.C., for plaintiff.

*Cattanach*, for defendant.

Proudfoot, J.]

[January 28.]

## PLATT v. GRAND TRUNK RAILWAY CO.

*Action—Breach of covenants for title—Continuing  
damages—Survivorship—Motion to set aside  
order of revivor.*

This action was brought by S. P., to whom the defendants had conveyed certain lands for a mill site and certain easements and privileges having reference to the said mill site with the usual covenants for title. S. P. now complains that the defendants had no title so to convey to him, and that his quiet enjoyment of the premises had been interfered with by persons having a better right, and he claimed for all damages sustained and to be



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NOTES OF CANADIAN CASES.

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sustained by reason of the breach of the covenants for title. After the case was set down for hearing, S. P. died intestate, and his administratrix obtained an order of revivor which it was now sought to set aside on the ground that the right of action, if any, was not one that survived to the representatives of S. P., or that if it did survive it survived to the real representatives, or to the real and personal representatives jointly.

*Held*, that as to damages which accrued during the lifetime of S. P. his administratrix is entitled to sue for the same; but that the action had nothing to do with damages which might have accrued since that time, for which *semble* the heir or devisee might bring an action, and the motion was therefore dismissed.

In the case of such covenants running with the land where only a formal breach takes place in the life of the ancestor the remedy for damages accruing after his death passes to the heir or devisee; but where not only the breach has taken place but damages had accrued in the lifetime of the ancestor the remedy for these damages passes to the personal representatives.

S. H. Blake, Q.C., for the motion.

MacLennan, Q.C., contra.

Boyd, C.]

[February 17.

#### RE PERCY, STEWART V. PERCY.

*Administration—Arrears of dower—Dower in equity of redemption—Instalment mortgage—Appeal from the master's report.*

This appeal arose out of the administration of the estate of Thomas Percy, who died on February 2nd, 1882. The usual administration order was made with a reference to the Master at Walkerton on February 14th, 1884. It appeared in the Master's office that the only real estate which the deceased died possessed of was a certain hotel property. The Master, in the course of the administration proceedings, sold this on November 13th, 1884. It appeared that this hotel had been purchased by the deceased, subject to a then existing mortgage upon it. The Master, therefore, allowed the widow, Margaret Percy, dower in the surplus only of the purchase money left after discharging the amount of the mortgage. A claim was made, however, by Margaret

Percy for a further sum as arrears of dower. It appeared that she had been in possession of the property from her husband's death by herself, or her tenants, up to the administration proceedings, and she had received certain rents. The master fixed the arrears of dower by taking the amount of rents received plus an occupation rent, fixed by him for a time when the widow was herself in possession, deducted from the amount thus arrived at a certain sum paid for taxes by the widow during that period, and certain other sums paid during that period by the mortgagees for insurance, and he also charged her with a certain sum as interest on the mortgage debt, charging same at ten per cent., and he gave the widow as arrears of dower one-third of the balance. It appeared, however, that the mortgage was an instalment mortgage, being payable in instalments composed of principal and interest together. The present appellants contended that the widow should have been charged with one-third of all the instalments which fell due during the period referred to, and also with one-third of the taxes and the insurance money paid upon the property.

*Held*, that the appeal arising in respect of arrears of dower, the husband not having died seized in fee so as to give the widow legal dower, she was not entitled to arrears as of right, but only on the equitable consideration of the Court, which would be exercised in her favour by not requiring her to account for all rents received, and the arrears of dower should be fixed by deducting from the rents received, and the occupation rent fixed by the master, the amounts properly and actually expended by the widow on taxes, insurance, repairs and payments on the mortgage, and then allowing her one-third of the balance for the arrears of dower.

A. H. F. Lefroy, for the appellant.

N. W. Hoyles, for the respondent.

Com. Pleas.]

NOTES OF CANADIAN CASES.

[Com. Pleas.

## COMMON PLEAS DIVISION.

RE MCINTYRE AND SCHOOL TRUSTEES OF  
BLANCHARD.*Public schools—Dismissal of scholar—Action—  
Mandamus.*

On 3rd December, 1884, a public school teacher dismissed the plaintiff, a boy of 13 years of age, for disobedience, speaking impudently when questioned about it, and refusing to be punished for misconduct. The matter was brought before the school trustees, and a meeting of the trustees held, and action taken in the matter; but a subsequent meeting was held, only two of the trustees being present, the third trustee not having been notified, when they decided that the son could return to school when he expressed regret to the teacher for his misconduct. The boy then returned to the school, but did not apologize. He remained there for several days without being interfered with, but the teacher did not give him any instruction. It did not appear that the teacher was acting under instructions from the trustees. In an action in the Division Court against the schoolmistress and trustees, the judge dismissed the action against the schoolmistress but held the trustees liable.

*Held*, on appeal to the Divisional Court, that the trustees were not liable.

*Smith*, for the appeal.

*Shepley*, for the defendant.

## MASSIE V. TORONTO PRINTING COMPANY.

*Libel—Excessive damages—New trial.*

Action for libel. The libel consisted in letters published in the defendants' newspaper, reflecting on the plaintiff as warden of the Central Prison. The defendants refused to give the names of the writers of the letters, and so assumed the responsibility. The jury found for the plaintiff with \$8,000 damages. The Court, under the circumstances, directed the verdict to be reduced to \$1,000 with costs, if paid before the 1st April, and the plaintiff elected to take such amount, but if not then paid by defendants the order should be discharged. If plaintiff did not so elect, a new trial was directed with costs to be paid by defendants.

*W. Nesbitt*, for the plaintiff.

*O'Donohoe*, Q.C., for the defendants.

## McROBERTS V. STEINHOBBS.

*Fraudulent conveyance—Intent—R. S. O. ch. 118;  
47 Vict. ch. 10, sec. 3 (O.).*

When there is a bona fide debt, secured by a chattel mortgage given thereon, the mortgage cannot be avoided by simply showing that the debtor was insolvent, and intended to give the mortgagee a preference. To avoid the transaction under R. S. O. ch. 118, there must be a concurrence of intent on the part of the debtor and the creditor taking the mortgage; and the amendment made by 47 Vict. ch. 10, sec. 3, does not affect the matter.

*Shepley*, for the plaintiff.

*W. H. Meredith*, Q.C., for the defendants.

McCONKEY V. CORPORATION OF  
BROCKVILLE.

*Municipal corporation—Flooding of cellar—Private  
drain connecting with street drain—Notice—  
Liability.*

Action against the defendants for the flooding of the plaintiff's cellar by the stoppage of a drain, whereby the water and filth from the sewers of private houses and the surface from the street passing down the drain to be dammed back through plaintiff's drain upon his premises. The obstruction was caused by a private individual, S., who had a drain connecting with the street drain, which was not known to the defendants, but was known to the plaintiff; and though he complained to some members of the corporation of the water, etc., being backed up, did not inform of the nature of the obstruction. The drain was a covered drain running under the sidewalk for a considerable distance, the end of the drain being near plaintiff's premises, but not extending so far as them: and he connected his private drain therewith. There was no by-law requiring property owners to drain their premises into the drain, and their use of it was entirely voluntarily. There was no complaint as to the insufficiency of the drain or as to the manner of its construction.

*Held*, that the defendants were not liable.

*Arnoldi*, for the plaintiff.

*Moss*, Q.C., and *Reynolds*, for the defendants.

Com. Pleas.]

NOTES OF CANADIAN CASES.

[Com. Pleas

## GRAY V. CORPORATION OF DUNDAS.

*Municipal corporations—Sewer connecting with creek—Fouling creek—Liability.*

The defendants had a drain on Main Street in the town of Dundas for carrying off the surface water of the street, along and across the street, and then through private property until it reached a creek. Certain screw works were carried on on Main Street near where the drain was. The proprietors of these works obtained permission to connect with the defendants' drain. Complaints being made of the drain being fouled by noxious matter from the works, the proprietors used an old cellar as a reservoir to contain the noxious matter from the works that had been formerly carried off by their drain. The noxious matter from the cellar, it was alleged, filtered through from the cellar into the drain, and was thus carried into the creek. The drain, without the infiltration into it from the cellar, from which it is distant twenty-six feet, would not convey anything injurious into the creek. The plaintiff was a riparian proprietor on the creek, and had a factory thereat, and brought an action against the defendants for the alleged fouling of the waters of the creek, whereby the plaintiff was prevented from using the waters of the said creek for domestic purposes, and for his said factory.

*Held*, that the action was not maintainable.

*Lount*, Q.C., for the plaintiff.

*Osler*, Q.C., for the defendants.

## MCGIBBON V. NORTHERN ETC., RY. CO.

*Railways—Fire caused from engine—Evidence.*

Action of negligence against the defendants in the conduct of their engine, whereby, as alleged, fire escaped therefrom and destroyed the plaintiff's property. It appeared that as the engine passed the plaintiff's stable and combustible manure heap, steam was put on which, it was urged, had the effect of causing a larger quantity of sparks to pass through the netting of the smokestack: but there was no evidence to show that a larger quantity of sparks did escape, or that the fire was caused thereby. It was further urged that the fire was caused from the ashpan; and as evidence thereof a cinder, too large to come from the smokestack, was picked up on the manure heap; but it did not clearly appear whether the cinder was from coal

or wood—the engine burning coal. The fire that broke out in the manure heap was put out, and about five minutes afterwards a fire broke out in a barn adjoining the plaintiff's, and consumed both. No evidence was given of any faulty construction in the engine; but it was shown to be of approved make, with proper appliances to prevent, as far as possible, the escape of fire.

*Held* (ROSE, J., dissenting), that there was no evidence of negligence to go to the jury: and the case was properly withdrawn from the jury.

*Lash*, Q.C., for the plaintiff.

*D'Arcy Boulton*, Q.C., for the defendants.

## INTERNATIONAL WRECKING AND TRANSPORTATION CO. V. LOBB.

*Salvage—High Court—Jurisdiction—Admiralty rules—Services performed on request—36 Vict. ch. 54. (D.).*

The schooner *Huron* was stranded on the northern shore of Lake Erie. The master telegraphed to the manager of a wrecking company at Detroit for tugs and wrecking apparatus. With their assistance the schooner was rescued and brought into a safe port. This action was then brought in this Court to recover an amount, made up chiefly of *per diem* charges for the tugs and apparatus, which exceeded the value of the vessel.

*Held*, that the action was a salvage action, and that the admiralty rules as to salvage awards and apportionment thereof, applied, though the action was brought in the High Court; that the maximum salvage award is a moiety of the *res* saved; and that wrecking companies are governed by the law of salvage as well as ordinary vessel owners.

*Held*, also, that the services were no less salvage because performed upon request.

*Kerr*, Q.C., and *Moss*, Q.C., for the plaintiffs.

*Osler*, Q.C., and *R. Gregory Cox*, for the defendant.

## CANADA ATLANTIC R. W. CO. V. CAMBRIDGE.

*By-law—Bonus—Aid to Dominion Railway—Promulgation—Effect of—Clerk casting vote—Majority of electors—Advertisement—Engineer's certificate.*

A by-law was passed by the defendants granting aid to plaintiffs' railway—a Dominion railway. The vote for and against the by-law was equal, and

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the clerk gave a casting vote in favour of the by-law, and it was then finally passed by the council. There was no resolution passed by the council designating the paper in which the notice was published, but the paper was the one usually employed for such purposes, and the account rendered therefor was passed, and paid by the council.

*Held*, following the judgment of PROUDFOOT, J., in *Canada Atlantic v. Corporation of Ottawa*, that under sec. 559, sub-sec. 4 of Mun. Act, R. S. O. ch. 174 (sec. 628 of Act of 1883), a grant by way of bonus may be made to a Dominion railway.

*Held*, also, that the promulgation of a by-law, though validating any defect in the form of or substance of the by-law, does not affect a matter not within the proper competency of the council to ordain; and, therefore, would not apply to cure the defect of the council in finally passing a by-law which had not received as required a majority of the votes of the electors; but *held*, there was a majority in this case, as the clerk had the right to give the casting vote.

*Held*, also, the advertisement was sufficient.

It was objected that the work had not been performed, and that a certificate to that effect, given by the engineer, was untrue; but

*Held*, that not only did the evidence not sustain the objection; but that the question was for the engineer, and he had given his certificate.

*McCarthy, Q.C.*, and *Chrysler*, for the plaintiffs.

*MacLennan, Q.C.*, for the defendants.

# PRACTICE.

*Mr. Dalton, Q.C.* [February 26.]

TATE V. THE GLOBE PRINTING CO.

*Examination of party—Pleading—Libel—Rule 285, O. J. A.*

In an action of libel charging the publication in a newspaper of a report of, and editorial comments upon, the trial of the plaintiff for the abduction of a girl, K., an order was made, under Rule 285, O. J. A., for the examination of the plaintiff before delivery of defence, in order to enable the defendants to frame their defence. The examination was

limited to the damages claimed by the plaintiff, and his conduct with and towards K.

*Osler, Q.C.*, for defendants.

*Murray (Brampton)*, for the plaintiff.

O'Connor, J.]

[March 2.]

RE GORDON V. O'BRIEN.

*Prohibition—Division Court—Splitting amount to give jurisdiction—R. S. O. ch. 47, sec. 59—Ascertainment of amount.*

The defendant rented certain premises from the plaintiff for a year, agreeing, in writing, to pay monthly \$125 therefor. When the rent had become four months in arrear the plaintiff entered three plaints in a Division Court against the defendant, each for a month's rent, \$125.

*Held*, that the sums claimed in the three plaints were payable under the one contract, and would have been included in one count in the old system of pleading, and therefore that the division into three was improper under R. S. O. ch. 47, sec. 59.

*Held*, also, that the defendant's signature to the memo. of lease could not be construed as ascertaining the amounts claimed in the plaints; and prohibition was ordered.

*Woods, Q.C.*, for the defendant.

*Idington, Q.C.*, for the plaintiff.

*Mr. Dalton, Q.C.*]

[March 2.]

GONEE V. LEITCH.

*Changing venue—Cross actions—Balance of convenience.*

The plaintiff herein having laid the venue in Toronto, the defendant brought a cross action laying the venue at London. The two actions were consolidated by order in Chambers.

*Held*, that both parties being in the position of plaintiffs, the rule as to the plaintiff's right to lay the venue where he chose could not be applied, and the only question was whether London or Toronto was the more convenient place for both parties; and the balance of convenience being in favour of London the place of trial was changed accordingly.

*W. H. P. Clement*, for defendant.

*Kappele*, for plaintiff.

## CORRESPONDENCE—LAW SOCIETY OF UPPER CANADA.

## NATURALIZATION OF ALIENS.

To the Editor of the LAW JOURNAL:

DEAR SIR,—It is said that large numbers of aliens were induced to become naturalized throughout the Province, in the latter part of last year, with a view to voting at the municipal elections in January; and that they were put through, in many places, in a cheap and expeditious manner, by persons anxious that they should vote in some particular way.

When naturalizations are effected in this way, there is danger of looseness in the observance of legal formalities; and little or no inquiry is made as to the character for loyalty, or otherwise, of the applicant, particularly where a "cheap job" is undertaken by some non-professional man. Citizenship has been described as a precious possession, to be highly prized; it certainly involves consequences of no small moment to a man and his family; and in view of the importance of the question, it would, no doubt, be better if persons who contemplate naturalization would attend to it at a time, other than during the excitement of approaching elections, and with the assistance of a practising solicitor whose knowledge of the law would ensure accuracy in the proceedings.

To assist my brethren in the profession, who may be called upon in such matters, I beg to append the following. The column for solicitor's fees is, of course, left open.

**STEPS** in a common Naturalization, uncontested, procured through a Solicitor. The Act and Orders-in-Council prescribe certain fees, as under, marked\*: Solicitor's or Counsel fees would be in analogy to charges for similar services in Court tariffs.

	SOLICITOR'S FEES.	DISBURSE- MENTS.
Instructions .....		\$ cts.
Preparing statutory declaration of House- holder vouching for applicant ( <i>evidence</i> <i>under sec. 12</i> ), and administering same...		
Preparing oath of Residence.....		
" " of Allegiance.....		
For administering oath of Allegiance .....		40*
Preparing and granting (or attending for) certificate B., Sec. 12 .....		
Attendance presenting certificate in open Court on first day of sitting.....		
Attendance on last day of sitting, filing same and obtaining certificate of Natara- lization (Form C.).....		25*
Paid Clerk of Court (Sec. 22).....		
If certificate required to be registered in the Land Office, under Sec. 21, 22, add.....		
Attending Registry Office .....		50*
Paid Recording .....		
" for Search and Certificate Copy of same .....		25*

For special cases reference should be made to the Act. Yours, etc., Lex.

## Law Society of Upper Canada.

## SUBJECTS FOR EXAMINATIONS.

## Articled Clerks.

- 1884 and 1885. { Arithmetic.  
Euclid, Bb. I., II., and III.  
English Grammar and Composition.  
English History—Queen Anne to George III.  
Modern Geography—North America and Europe.  
Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

## Students-at-Law.

1884. { Cicero, Cato Major.  
Virgil, Æneid, B. V., vv. 1-361.  
Ovid, Fasti, B. I., vv. 1-300.  
Xenophon, Anabasis, B. II.  
Homer, Iliad, B. IV.
1885. { Xenophon, Anabasis. B. V.  
Homer, Iliad, B. IV.  
Cicero, Cato Major.  
Virgil, Æneid, B. I., vv. 1-304.  
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

## ENGLISH.

A Paper on English Grammar. Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

## FRENCH.

A paper on Grammar, Translation from English into French prose.  
1884—Souvestre, Un Philosophe sous le toits.  
1885—Emile de Bonnechose, Lazare Hoche.

LAW SOCIETY OF UPPER CANADA.

OF NATURAL PHILOSOPHY.

*Books*—Arnett's elements of Physics, and Somerville's Physical Geography.

*First Intermediate.*

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

*Second Intermediate.*

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

*For Certificate of Fitness.*

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

*For Call.*

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any University in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission to the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchor, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six

## LAW SOCIETY OF UPPER CANADA.

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchler, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## F E E S .

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees.....	40 00
Solicitor's Examination Fee.....	60 00
Barrister's " " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions.....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission.....	1 00
Fee for other Certificates.....	1 00

## PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890.

*Students-at-Law.*

## CLASSICS.

1886.	Cicero, Cato Major.
	Virgil, Æneid, B. I., vv. 1-304.
	Cæsar, Bellum Britannicum.
	Xenophon, Anabasis, B. V.
	Homer, Iliad, B. VI.
1887.	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. VI.
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. I.
	Cæsar, Bellum Britannicum.
1888.	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. IV.
	Cæsar, B. G. I. (vv. 1-33.)
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. IV.
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. V.
	Cæsar, B. G. I. (vv. 1-33)
1890.	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. VI.
	Cicero, In Catilinam, II.
	Virgil, Æneid, B. V.
	Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's *Arnold's Composition*, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

## MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

## ENGLISH.

A Paper on English Grammar. Composition.

Critical reading of a Selected Poem:—

1886—Coleridge, *Ancient Mariner* and *Christabel*.

1887—Thomson, *The Seasons*, Autumn and Winter.

1888—Cowper, *the Task*, Bb. III. and IV.

1889—Scott, *Lay of the Last Minstrel*.

1890—Byron, *the Prisoner of Chillon*; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

## HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe. Optional Subjects instead of Greek:—

## FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886

1888 } Souvestre, *Un Philosophe sous le toits*.

1890

1887 } Lamartine, *Christophe Colomb*.

1889

## or, NATURAL PHILOSOPHY.

*Books*—Arnot's *Elements of Physics*; or Peck's *Ganot's Popular Physics*, and Somerville's *Physical Geography*.

## ARTICLED CLERKS.

Cicero, Cato Major; or, Virgil, Æneid, B. I., vv. 1-304, in the year 1886; and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, or Virgil, at the option of the candidate, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe. Elements of Book-Keeping.

*Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.*

# Canada Law Journal.

VOL. XXII.

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No. 7.

## DIARY FOR APRIL.

- 4. Sun.....*4th Sunday in Lent.*
- 5. Mon.....C. C. term begins. C. C. Sittings, for trial of non-jury cases, begin, except in York.
- 9. Fri.....Lord Bacon died 1626, *et.* 66.
- 10. Sat.....County Court term ends.
- 11. Sun.....*5th Sunday in Lent.*

TORONTO, APRIL 1, 1886.

THE time has again come round for the election of the Benchers of the Law Society, and the usual preliminary skirmishing has been going on. The voting papers have to be sent to the Secretary of the Law Society between the 29th day of March last and the 7th day of April instant, both inclusive. All received by post prior to the first date and after the second will be useless. Several lists have been given to the public. A correspondent sends us another for publication, which will be found in another place. While we do not in any way further this list, the names seem representative in their character, and the list has the advantage of bringing to the notice of the profession several new names which are entitled to consideration. No list, of course, can include all names one might like to see upon it, and some must necessarily be omitted.

In several places the local Bars have, we understand met, and, with more or less unanimity, decided as to those they desire should be elected as their representatives. Their recommendations will doubtless receive due consideration.

We are surprised that the country practitioners have not combined more in their own interest to elect men who would urge legislation to protect their undoubted rights. The Society at present receives their fees, and makes no attempt to save them from spoliation, and calmly contemplates their death by starvation.

## RECENT ENGLISH DECISIONS.

The *Law Reports* for March comprise 16 Q. B. D. pp. 305-514; 11 P. D. pp. 13-20; 31 Chy. D. pp. 251-350; and 11 App. Cas. pp. 1-92.

POSTPONEMENT OF MORTGAGE TO SUBSEQUENT MORTGAGE AT REQUEST OF MORTGAGOR—IMPLIED PROMISE TO INDEMNIFY.

*Ex parte Ford*, 16 Q. B. D. 305, although a bankruptcy case, is nevertheless of some general interest. In order to enable the owner of the equity of redemption to obtain a further advance from a first mortgagee, a second mortgagee agreed to postpone his mortgage to that of a third mortgage held by the first mortgagee, and also to the further advance. The mortgaged property was ultimately sold, and failed to realize sufficient to pay the second mortgagee the whole amount due to him. The mortgagor having become bankrupt the second mortgagee claimed to prove against his estate for the deficiency. It is not expressly stated in the report, but it seems probably to have been the fact, that the bankrupt was not personally liable for the payment of the second mortgage debt. If he had been, we do not see that there would have been any room for controversy as to the liability of his estate. It was held by the Court of Appeal that the estate was liable on an implied promise on the part of the bankrupt to indemnify the second mortgagee for any loss he might suffer from the postponement of his claim. Lord Esher, M.R., said:

It seems to me that whenever circumstances arise in the ordinary business of life in which, if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that such a promise was given and accepted.

PAYMENT OF MONEY UNDER MISTAKE OF LAW.

*Ex parte Simmonds*, 16 Q. B. D. 308, is another decision in bankruptcy of some general interest. In this case it was held by the Court of



## RECENT ENGLISH DECISIONS.

Appeal that the ordinary rule as between litigants, that money paid under mistake of law cannot be recovered, does not apply to a payment made under such a mistake to a trustee in bankruptcy, on the ground that he is an officer of the Court; and in such a case, on the mistake being discovered, the Court will direct him out of the moneys in his hands, or thereafter coming to his hands, to refund the money paid him by mistake. Lord Esher, M.R., thus stated the principle on which the Court acts in such cases:

A rule has been adopted by Courts of law for the purpose of putting an end to litigation; that, if one litigant party has obtained money from the other erroneously under a mistake of law, the party who has paid it cannot afterwards recover it. But the Court has never intimated that it is a high-minded thing to keep money obtained in this way; the Court allows the party who has obtained it to do a shabby thing in order to avoid a greater evil; in order, that is, to put an end to litigation. But James, L.J., laid it down in *Ex parte James*, 9 L. R. Chy. 609, that although the Court will not prevent a litigant party acting in this way, it will not act so itself, and it will not allow its own officer to act so.

## LIBEL—VENDOR OF NEWSPAPER.

In *Emmens v. Pottle*, 16 Q. B. D. 354, the Court of Appeal (affirming Wills, J.) laid down what we think must strike everyone as a reasonable rule in reference to the law of libel. The action was brought to recover damages for the publication of a libel contained in a newspaper sold by the defendants in the ordinary course of their business. The jury found that the defendants were ignorant that the newspaper contained or was likely to contain the libel on the plaintiff, and it was not by negligence that they were so ignorant. The judge at the trial, on this finding, ordered judgment to be entered for the defendant. The plaintiff appealed, and argued his case in person; and Lord Esher, M.R., said that it would be impossible for anyone to have argued it in better form, or with better logic; the Court, nevertheless, on the findings of the jury, held that the judgment was right. Lord Esher remarks at page 357:

The question does not depend on any statute, but on the common law, and, in my opinion, any proposition the result of which would be to shew that the common law of England is wholly unreasonable and unjust, cannot be part of the common law of England.

## ACTION BY HUSBAND AGAINST WIFE FOR MONEY PAID TO HER USE.

In *Butler v. Butler*, 16 Q. B. D. 374, the Court of Appeal held (affirming the judgment of Wills, J., 14 Q. B. D. 831) that inasmuch as before the Married Woman's Property Act, 1882, a husband could in equity obtain a decree against his wife for breach of any contract whereby she intended to bind her separate estate, so he has still that right; and that it is competent for him to maintain an action against his wife in order to charge her separate estate with moneys lent by him to her after their marriage, and money paid by him for her after their marriage, at her request, made before or after their marriage.

## JOINT ADVENTURE—LOSS—CONTRIBUTION.

In *Lowe v. Dixon*, 16 Q. B. D. 455, Lopes, J., was called on to apply the equitable rule as to contribution between parties to a joint adventure. A., B. and C. purchased goods on a joint adventure. The plaintiffs, on their behalf, paid for the goods, which they afterwards sold for the benefit of all at a loss. B. became bankrupt, and only a dividend on the amount of his share of the purchase money was received by the plaintiffs, and the question in the present action was whether A. and C. were liable to contribute equally to make good the default of B., and Lopes, J., held that they were. The learned judge points out the distinction which formerly prevailed at law and equity on this point, thus:—

At law, if several persons have to contribute a certain sum the share which each has to pay is the total amount divided by the number of contributors, and no allowance is made in respect of the inability of some to pay their shares. But, in equity, those who can pay must not only contribute their own shares, but they must also make good the shares of those who are unable to furnish their own contribution.

## CONTRACT, BREACH OF, BY REPUDIATION BEFORE TIME FOR PERFORMANCE.

In *Johnstone v. Milling*, 16 Q. B. D. 460, the Court of Appeal reversed the judgment of the Divisional Court composed of Huddleston, B., and Cave, J. A counter claim was set up by a lessee against his lessor for breach of covenant to rebuild the demised premises. The covenant in question was contained in a lease for twenty-one years determinable by the lessee at the end of the first four years by

## RECENT ENGLISH DECISIONS.

a six months' notice, and thereby the lessor covenanted to rebuild the premises after the expiration of the first four years. Before the expiration of the first four years the lessor frequently told the lessee that he would be unable to procure the money for rebuilding; and in consequence of this statement the lessee gave notice to terminate the lease at the expiration of the four years. After the determination of the lease the lessee continued in possession, paying rent to the lessor's mortgagees, on the chance, as he stated, of the lessor's procuring the money to rebuild. The lessor, however, being unable to rebuild, the lessee now claimed damages for breach of the contract to do so. But the Court of Appeal held that the lease having been terminated before the time fixed for the performance of the contract to rebuild, there had been no breach of it, unless it could be said that there had been an anticipatory breach of it within the doctrine laid down in *Hochester v. De la Tour*, 2 E. & B. 678, and *Frost v. Knight*, L. R. 7, Ex. 111, by reason of a wrongful repudiation of the contract before the time for performance; but they held that what the lessor had said as to his inability to raise the money to rebuild could not be considered such a repudiation, and the counter claim was therefore dismissed.

## PENAL ACTION—DISCOVERY.

In *Martin v. Treacher*, 16 Q. B. D. 507, the Court of Appeal (affirming the Court below) held that the general rule is, that in an action for penalties by a common informer leave will not be given to the plaintiff to administer interrogatories for the purpose of discovery.

## DISSENTING DEED—RECTIFICATION OF MISTAKE.

Proceeding now to the cases in the Chancery Division the first to be noticed is *Hall-Dare v. Hall-Dare*, 31 Chy. D. 251, which is a decision of the Court of Appeal overruling the judgment of Bacon, V.C., in 29 Chy. D. 133, which we noted *ante*, vol. 21 p. 267. The Court of Appeal taking the more liberal view that a mistake in a settlement might be rectified although included in a disentailing deed, notwithstanding the provisions of 3 & 4 Wm. IV. c. 74 s. 47 (R. S. O. c. 100, s. 96.)

## SETTLEMENT—ELECTION AGAINST VOIDABLE COVENANT—COMPENSATION TO THOSE DISAPPOINTED.

The Court of Appeal, in *In re Vardon's Trusts*, 31 Chy. D. 275, have reversed the decision of Kay, J. (28 Chy. D. 124), which we noted *ante*, vol. 21, p. 129. A married woman at the time of her marriage, being then an infant, executed a settlement containing a covenant on her part to settle after-acquired property. Under the settlement she was entitled to the income of a fund, subject to a restraint against anticipation. Subsequently she became entitled to a legacy which she refused to settle; and Kay, J., held that those who were disappointed by her refusal were entitled to be compensated out of the life estate she was entitled to under the settlement. In arriving at this conclusion he followed a decision of Wood, V. C., in *Willoughby v. Middleton*, 2 J & H. 344; but the Court of Appeal, finding a conflict of authority on the point, decided the question on principle, and adopted the conclusion of Sir Geo. Jessel in *Smith v. Lucas*, 18 Chy. D. 531, and held that those who were disappointed by the refusal to settle the after-acquired property were not entitled to compensation out of the fund to which the married woman was entitled under the settlement, because the clause against anticipation would in that event be defeated.

## GIFT—REVOCATION—TRANSFER OF STOCK INTO JOINT NAMES OF DONOR AND DONEE.

*Standing v. Bowring*, 31 Chy. D. 282, is a somewhat curious case. The plaintiff, an old lady of eighty-six, desiring to benefit the defendant, who was her god-son, transferred a sum of £6,000 stock into their joint names with the express intention that if he survived her he should have the stock for his own benefit. She had been previously warned that if she made the transfer she could not revoke it. Fearing that the anticipation of wealth would make the defendant less active in the duties of life, she did not inform him of the fact of the transfer having been made. Two years afterwards the old lady married, and shortly afterwards the defendant learned for the first time of the transfer, by the receipt of a letter requiring him to re-transfer the stock to the name of the plaintiff. Having refused to do this, the action was brought, claiming to have it declared that the defendant was trustee for the plaintiff. But the Court of Appeal unani-

## RECENT ENGLISH DECISIONS—LAW SOCIETY.

mously affirmed the judgment of Pearson, J. (27 Chy. D. 341), dismissing the action, holding that the gift was complete by the transfer, and that vested the property in the donee, subject to his right to repudiate the gift when informed of it, if he pleased.

The *prima facie* presumption of a resulting trust in favour of the plaintiff was held to be rebutted by the evidence showing that the plaintiff intended, at the time of the transfer, and for some time afterwards, to benefit the defendant.

## INFANT—MAINTENANCE—CHARGE ON REAL ESTATE.

*In re Hamilton*, 31 Chy. D. 291, the Court of Appeal held that an order could not properly be made to charge infants' estate with their maintenance under the following circumstances:—The two infants were entitled to successive estates tail in remainder after the life estate of their father, which life estate had been sold under his bankruptcy. The father was abroad, and judicially separated from their mother, and was contributing nothing to their support. It was proposed to borrow by way of mortgage or charge on the infants' real estate, secured by policies of insurance on the lives of the infants, a sum to provide for their future maintenance, the amount for which the charge was to be given, including the premiums on the insurance. The Court, however, held that as the estate of the infants in the land could not, in the lifetime of their father, be taken in execution, the Court had, therefore, no power to charge it. Fry, L.J., was also of opinion that no effectual charge for the whole of the proposed advance could be made against the estate of the infant, who first became entitled in possession, because his estate could, in any case, only be made liable for what should be expended for his own maintenance.

## LAW SOCIETY.

## MICHAELMAS VACATIO.

The following is the résumé of the proceedings of Convocation published by authority.

MONDAY, 29TH DECEMBER, 1885.

Present—The Treasurer and Messrs. S. H. Blake, Cameron, Ferguson, Guthrie, Irving, Kerr, Maclellan, Morris, Moss, Murray, Mackelcan, McMichael, Purdom, Robinson and Smith.

The minutes of last meeting were read and approved.

The report of the Secretary on the cases of Messrs. Latchford and Atkinson was read, shewing that each of these gentlemen had respectively complied with the conditions prescribed during last Term, and were entitled to Certificates of Fitness.

The report was received, ordered for immediate consideration, and adopted.

Ordered, That Messrs. Latchford and Atkinson do receive their Certificates of Fitness.

Mr. Murray, from the Finance Committee, reported verbally that the Ontario Government had caused the library ceiling to be examined and repaired, and that during next long vacation they proposed to repaint the room.

Mr. Maclellan, from the Committee on Reporting, presented the following report:

The Committee on Reporting beg leave to report as follows:

In consequence of the increase in the number of persons entitled to receive the reports, your committee recommend that the edition to be printed in future be increased from thirteen hundred and fifty to fifteen hundred.

The report was read and received; ordered for immediate consideration. Adopted and ordered accordingly.

Mr. Irving, from the Library Committee, presented their report with reference to changes proposed in the arrangement of books in the library, and recommending the removal of the Parliamentary Journals and Sessional Papers of Canada and Ontario, and also the Imperial Hansard, Canadian Hansard, etc., to the gallery of the new hall.

## LAW SOCIETY.

The report was read and received. Ordered for immediate consideration and adopted.

The petition of J. Thacker was received and read. Ordered for consideration forthwith, and disallowed.

The letter from W. A. Taylor, Esq., of Winnipeg, on the subject of supply of the reports to the Manitoba Bar, was read, and ordered to be referred to the Reporting Committee for report.

The letter of Mr. Alan Cassels, on the subject of Mr. Sibley, was read.

Ordered thereon, That the report of the Discipline Committee on the case of Sibley be considered on the second day of next Term.

Mr. Moss moved, seconded by Mr. Mackelcan, that the rules for the call of barristers, etc., read a second time at the last sitting of Convocation, be now read a third time. Carried.

The rules were passed, and are as follows:—

**RULES FOR THE CALL OF BARRISTERS IN SPECIAL CASES UNDER REVISED STATUTES, ONTARIO, CH. 138, SEC. 38.**

94. The following persons may, as special cases, be called to practise at the Bar:

(1) Any person who has been duly admitted and enrolled, and has been in actual practice as a Solicitor of the Supreme Court of Ontario, or an Attorney or Solicitor in the Superior Courts of any of the other Provinces of the Dominion in which the same privilege is extended to Solicitors of the Supreme Court of Ontario.

(2) Any person who has been duly called to the Bar of England, Scotland, or Ireland (excluding the Bar of merely local jurisdiction), when the Inn of Court, or other authority having power to call or admit to the Bar by which such person was called or admitted, extends the same privilege to Barristers from Ontario, on producing sufficient evidence of such call or admission, and testimonials of good character and conduct to the satisfaction of the Law Society.

(3) Any person who has been duly called to the Bar of the Superior Courts of any of the other Provinces of the Dominion in which the same privilege is extended to Barristers of Ontario.

95. Every such person, before being called to the Bar, shall furnish proof,

(1) That notice of his intention to apply for call to the Bar was given during the term next preceding that in which he presents himself for call and was also published for at least two months preceding such last mentioned term in the *Ontario Gazette*.

(2) That he was duly admitted and enrolled and has been in actual practice as an Attorney or Solicitor as mentioned in sub-section 1 of Rule 94 and that he still remains duly enrolled as such and in good standing, and that since his admission as aforesaid no adverse application has been made to

any Court or Courts to strike him off the roll of any Court or otherwise to disqualify him from practice as such Attorney or Solicitor, and that no charge is pending against him for professional or other misconduct.

(3) Or that he was duly called to and is still a member in good standing of the Bar, as mentioned in sub-sections 2 and 3 of Rule 94, and that since his call no adverse application has been made to disbar or otherwise disqualify him from practice at the Bar of which he claims to be a member, and that no charge is pending against him for professional or other misconduct.

(4) That he has passed one or more examinations as hereinafter prescribed,

(a) An Attorney or Solicitor of at least five years' standing on the Rolls of any of the Courts mentioned in the said sub-section 1 of Rule 94 shall be examined with the ordinary candidates for call in the subjects prescribed for the final examinations of Students-at-Law.

(b) An Attorney or Solicitor under five years' standing on the Roll of any of the Courts mentioned in the said sub-section 1 of Rule 94 shall be examined with candidates for admission in the subjects prescribed for the primary examination of Students-at-Law, and with the ordinary candidates for call in the subjects prescribed for the final examination of Students-at-Law, and such examinations may be passed at the one term or otherwise, as the candidates may desire.

(c) A Barrister as mentioned in sub-sections 2 and 3 of Rule 94 shall pass such examination as may be prescribed at the time of his application for call.

96. The fees payable by such candidates for call to the Bar in addition to the ordinary fees payable for admission, and for call, shall be the sum of two hundred dollars.

**RULES FOR THE ADMISSION OF SOLICITORS IN SPECIAL CASES, UNDER REVISED STATUTES, ONTARIO, CHAPTER 138, SECTION 41.**

97. The following persons may, as special cases, be admitted and enrolled as Solicitors of the Supreme Court of Ontario.

(1) Any person who has been duly called to practise at the Bar of Ontario, or in any of the Superior Courts not having merely local jurisdiction, in England, Ireland, or Scotland, or in the Superior Courts in any of the other Provinces of the Dominion.

2. Any person who has been duly admitted and enrolled as a Solicitor of the Supreme Court of Judicature in England, or as an Attorney and Solicitor in the Courts of Chancery, Queen's Bench, Common Pleas, or Exchequer in Ireland, or as a Writer to the Signet, or Solicitor in the Superior Courts of Scotland, or as an Attorney or Solicitor of any of Her Majesty's Superior Courts of Law or Equity in any of Her Majesty's Colonies wherein the Common Law of England is the Common Law of the land.

98. Every such person before being admitted to practise as a Solicitor, shall, after complying with provisions of Revised Statutes of Ontario, chapter 140, section 7, furnish proof.

1. A Barrister as mentioned in sub-section 1 of Rule 97 that he was bound by a contract in writing to a practising Solicitor in Ontario to serve, and has served him as his articulated clerk for the period of three years.

## LAW SOCIETY.

2. An Attorney, Solicitor, or Writer (as mentioned in sub-section 2 of Rule 97) that he was bound by a contract in writing to a practising solicitor in Ontario to serve, and has served him as his articulated clerk for the period of one year.

3. That he has passed the usual examination in the subjects prescribed for the examination of candidates for Certificate of Fitness to practise as Solicitors of the Supreme Court of Ontario.

4. That notice of his intention to apply for admission as such Solicitor was given during the term next preceding that in which he presents himself for examination and admission, and was also published for at least two months preceding such last-mentioned term in the *Ontario Gazette*.

99. The fees payable by such candidates for admission to practice, in addition to the ordinary fees for articulated clerks, and for admission, shall be the sum of two hundred dollars.

Mr. Mackelcan obtained leave to bring in the following rule:

That for the more effectual carrying out of the report of the Committee on Reporting adopted in Convocation on 9th February, 1884, rule numbered 155 is hereby repealed, and the following rule is substituted therefor:

(155) The Secretary shall subscribe for eight copies of the reports of the Supreme Court of Canada for the Osgoode Hall library and one copy for each of the county libraries to be supplied at the expense of the society.

The rule was read a first, second and third time, and passed.

Ordered, That the Library Committee be authorized to prepare a new edition of the catalogue of the library of Osgoode Hall, and to report to Convocation on the progress of the work, and as to the publication next Term.

Ordered, That it be referred to the Journals Committee to prepare a draft consolidation of the rules of the society, and to report to Convocation next Term.

Convocation adjourned.

HILARY TERM, 49 VICT., 1886.

During Hilary Term the following gentlemen were called to the Bar, namely:

Messrs. Edward K. C. Martin and George L. Taylor who passed their examination for Call last Term, and Messrs. Ernest Frederick Gunther, John Greer, Daniel Coughlin, Albert Edward Kennedy, Francis Robert Latchford, Frederick Weir Harcourt, Henry Wissler, Alfred Mitchell Lafferty, Thomas Davy Jermyn Farmer, John Wendell McCullough, Joseph Nason, Frederick Sheppard O'Con-

nor, William Edward McKeough, Robert Bertram Beaumont, Charles Franklin Farewell.

The following gentlemen were granted Certificates of Fitness, namely:

Messrs. J. A. McIntosh, W. D. McPherson, H. J. Wright, T. B. Lafferty, M. Wilkins, Jr., T. D. J. Farmer, O. E. Fleming, J. Nason, A. B. Shaw, W. Morris, A. S. Campbell, R. Walker, E. A. Wismer, E. M. Yarwood, W. E. McKeough, J. F. Williamson, H. Wessler, R. B. Beaumont, J. S. Mackay, D. Coughlin, J. Thacker, W. B. Raymond, J. W. McCullough, A. McKechnie, G. E. Martin.

The following gentlemen passed the First Intermediate Examination, namely:

Messrs. H. L. Dunn (Honors and First Scholarship); F. Smoke (Honors and Second Scholarship), and Messrs F. Sangster, J. B. McCaul, Jas. Fraser, D. L. Sinclair, J. F. Gregory, J. B. Lucas, J. Coutts, F. C. Jarvis, F. B. Denton, R. F. Lyle, R. M. Dennistoun, C. D. Fripp, W. C. Chisholm, J. Ross.

The following gentlemen passed their Second Intermediate Examination, viz.:

Messrs. W. H. Hearst (Honors, First Scholarship); R. U. McPherson (Honors, Second Scholarship); W. J. Sinclair (Honors, Third Scholarship); A. E. Watts (Honors); and Messrs. C. J. McCabe, E. Heaton, J. H. Bowes, W. F. Kerr, S. C. Warner, H. G. Tucker, H. Guthrie, J. H. Burnham, A. D. Creasor, A. W. Lane, W. K. Cameron, J. P. Moore, J. Hood, J. H. Jackes, D. D. Grierson, J. Craine, J. C. Grant, A. E. Taylor, C. H. Brydges, E. A. Crease, T. F. Johnson, P. M. Bankier, G. H. Hutchinson, A. C. Steele, O. M. Arnold, A. L. Smith.

The following gentlemen were admitted as students-at-law, namely:

*Graduates.*—Victor Crossley McGirr, Archibald Weir, Isaac Newlands.

*Matriculants.*—Frederick William Hill, Arthur Franklin Crowe, Edward Lindsay Middleton, James Hamilton McCurry, Robert Ernest Gemmell, Hugh James Minnhinnick, Merritt Oaklands Sheets, A. E. Slater.

*Juniors.*—George Edmuhd Jackson, John Agnew, George Turbill Falkiner, Dighton Winans Baxter, Charles Edwin Oles, Charles James Notter, William Carnew, Henry Lumley Drayton, Charles

## LAW SOCIETY.

Franklin Gilchriese, Edward John Harper, William Herbert Cawthra, John Francis Lennox, Augustus Grant Malcolm, Honore Chatelaine.

*Articled Clerk.*—Alfred James Fitzgerald Sullivan passed the Articled Clerks' Examination.

MONDAY, 1ST FEBRUARY, 1886.

Convocation met.

Present—Messrs. Britton, Falconbridge, Ferguson, Foy, Hoskin, Irving, Kerr, Mackelcan, Maclellan, Martin, Meredith, Morris, Murray, McCarthy, McMichael, Osler, Purdom, Robertson and Robinson.

Mr. Maclellan was appointed Chairman in the absence of the Treasurer.

The minutes of last meeting were read, approved and signed by the Chairman.

Mr. Murray presented the report of the Finance Committee, which was received, read and ordered to be considered forthwith.

Ordered, That the report be adopted and the deed, relating to the grounds at Osgoode Hall referred to in the report, executed by the Society.

The report of the Legal Education Committee on the case of A. G. McLean was ordered for immediate consideration, and adopted.

Mr. Mackelcan presented the report of the Special Committee on Honors and Scholarships in connection with the First and Second Intermediate. Messrs. H. L. Dunn and F. Smoke passed the First Intermediate, with honors, and Mr. Dunn is entitled to receive one hundred dollars and Mr. Smoke to receive sixty dollars.

Messrs. W. H. Hearst, R. U. McPherson, W. J. Sinclair and A. E. Watts passed the Second Intermediate, with honors, and Mr. Hearst is entitled to get one hundred dollars, Mr. McPherson to get sixty dollars and Mr. Sinclair to get forty dollars.

The report was adopted.

The Secretary reported on the cases of S. T. Hamilton, Peter Franklin Young and J. Percy Lawless, reserved last Term, in respect of their Second Intermediate Examination, that they have complied with the direction of the Committee, and are now entitled to be allowed their examination as of last Term. Ordered accordingly.

Mr. Britton presented the petition of John Shaw Skinner, Captain Prince of Wales Rifles, to be allowed his Second Intermediate Examination as of this Term on account of compulsory absence on military duty.

Ordered, That the petition be granted under the exceptional circumstances of the case, and that Mr. Skinner be allowed his Second Intermediate Examination as of the present Term.

Mr. Osler presented the petition of Alex. Cameron Rutherford, solicitor, of Ottawa, to be allowed his examination for call on the ground of illness during his examination.

Ordered, That he be allowed another oral examination during the present Term.

Mr. Mackelcan presented the report of the Special Committee on the case of Mr. F. S. O'Connor, that he is entitled to be called to the Bar.

The report was received and read, considered and adopted.

Mr. O'Connor was ordered to be called to the Bar accordingly.

Upon the motion of Mr. Morris it was ordered that the Finance Committee prepare and submit to Convocation during present Term a statement in detail of the assets and liabilities of the Society to 31st December, 1885.

Ordered, That the use of the convocation and benchers' rooms and library be granted for the occasion of a dinner to be given by the York Bar Association and the Osgoode Legal and Literary Society.

The Secretary laid on the table a list of voters for the election of benchers under section 15 of the Act relating to the Law Society.

Ordered, That Mr. D. B. Read, Q.C., and Mr. Murray be appointed to act as scrutineers, and Mr. Maclellan to act as and for the Treasurer in case he should be absent during the meetings of scrutineers to count the votes at the ensuing election of benchers, and that each of the scrutineers be paid the sum of twenty dollars for each day's attendance.

Mr. Falconbridge gave notice of motion for to-morrow that he will move that the use of a portion of the ground lying to the west of the building be permitted to members of the Law Society as a lawn tennis court.

Convocation adjourned.

## LAW SOCIETY.

TUESDAY, 2ND FEBRUARY, 1886.

Convocation met.

Present—Messrs. Falconbridge, Foy, Irving, MacLennan, Martin, Meredith, Morris, Moss, Murray, Osler, Purdom, Robinson.

Mr. MacLennan was appointed Chairman in the absence of the Treasurer.

The minutes of the last meeting were read and approved.

Mr. Moss, from the Legal Education Committee, reported, recommending that Mr. D. Coughlin be allowed his Certificate of Fitness, and that Mr. J. Ross be allowed his First Intermediate Examination.

The report was read and received; ordered for immediate consideration, and adopted. Ordered accordingly.

The Secretary reported that Mr. James F. Williamson is in due course, and is now entitled to his Certificate of Fitness.

Ordered, That Mr. Williamson's Certificate be granted.

Convocation considered the report of the Discipline Committee of 5th December, 1885, on the case of Mr. W. H. Sibley.

Ordered, That the report be adopted, and that the charge against Mr. Sibley be referred to the Discipline Committee for investigation.

Ordered, That the use of the lawn to the west of the Osgoode Hall buildings be granted to the Osgoode Legal and Literary Society for the purposes of a lawn tennis ground, subject to the superintendence of the Finance Committee.

Mr. Purdom gave notice of motion for next Saturday as follows:

That on Saturday, the 6th instant, he would move that it be referred to the Legal Education Committee to consider the advisability of permitting the Faculty of the Western University to conduct all examinations of students attending that university required by this Society, and the adoption thereof by this Society; also to consider the advisability of establishing a law school in connection with Toronto University similar to that now established in connection with the Western University, and to report at the next meeting of Convocation.

The Secretary reported that Messrs. McCullough and McKeough have completed their papers and are entitled to Certificates of Fitness.

Ordered, That their Certificates of Fitness be granted.

A petition, now before the Legislature of Ontario, by one Delos R. Davis, who was admitted as a solicitor last year, for an act to be admitted to the Bar, was laid before Convocation.

The Chairman was authorized to point out to the Attorney-General and to the Chairman of the Private Bills Committee and to the member in charge of the Bill the erroneous statements in the petition of the Rules of the Society applicable to his case.

Convocation adjourned.

SATURDAY, 6TH FEBRUARY, 1886.

Convocation met.

Present—The Treasurer and Messrs. Bell, Falconbridge, Foy, Irving, Kerr, MacLennan, Meredith, Morris, Murray, Osler, Purdom, Robertson, Robinson and Smith.

The minutes of last meeting were read, and approved.

Mr. Morris, from the Legal Education Committee, reported on the case of A. E. Slater, a candidate for admission as a Student-at-Law in the matriculant class, that he is entitled to be admitted.

The report was ordered for immediate consideration, and adopted.

Ordered, That Mr. A. E. Slater be admitted as a student in the matriculant class.

The Secretary reported on the cases of Messrs. Beaumont, McKechnie, Thacker and Wissler, which had been reserved, that they have completed their time and papers, and are entitled to Certificates of Fitness.

Ordered, That they receive their Certificates of Fitness.

The letter of Mr. Galbraith as to the fees of the late Mr. Fenton was read.

Ordered, That it be referred to the Finance Committee for consideration, and report to Convocation.

The petition of H. H. Robertson, praying for a reconsideration of the marks on his examination for call, was read.

Ordered, That it be considered forthwith.

Ordered, That it be referred to the Legal Education Committee to consider the petition, and also the cases of the other

persons who had failed under the examiners' report on the call examination, and to report to Convocation whether any, and if so, what relief should be granted to them or any of them.

Mr. Purdom laid before Convocation the letter of Mr. Mills, of 5th February, touching his notice of motion.

Mr. Purdom, seconded by Mr. Meredith, moved :

That it be referred to the Legal Education Committee to consider the advisability of permitting the Faculty of the Western University to conduct all examinations of students attending that university required by this Society, and the adoption thereof by this Society; also to consider the advisability of establishing a law school in connection with Toronto University, similar to that now established in connection with the Western University, and to report at the next meeting of Convocation whether, in their opinion any, and if so, what changes can be advantageously made in the course and in the examinations. Carried.

Convocation adjourned.

(Signed) J. K. KERR,

Chairman Committee on Journals and Printing.

## NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

### QUEEN'S BENCH DIVISION.

IN BANCO.

SMITH V. CITY OF LONDON INSURANCE CO.

*Insurance—Misdescription of premises—Waiver—Arbitration—Verdict—Variance—Statutory conditions—Variation.*

Plaintiff described insured building by a term intended for board, but read by company as brick, as which they insured the premises, not finding out mistake till after the fire. The 17th statutory condition on policy was that the

loss should not be payable for thirty days after completion of proofs of loss, unless otherwise provided by statute or agreement of parties, and there was a condition on policy as required by the Fire Insurance Policy Act as a variation of conditions that "the loss should not be payable till sixty days after completion of claim." Action was begun more than thirty but less than sixty days after fire. After action defendants demanded magistrate's certificate under statutory condition 13 E., and had an arbitration under condition 15, and by the award the value of building was put at \$2,500, and loss at \$1,700. The jury found former \$3,500 and loss \$3,500.

*Held (per WILSON, C.J.), 1.* That by reason of mistake as to character of premises there never was any contract, but that defendants waived the right to object to the mistake by demanding the magistrate's certificate and the arbitration. *2.* That the finding of jury as to value of building must prevail, notwithstanding the award. *3.* That the condition that the loss should not be payable till sixty days after completion of claim being in policy, and not dissented from by plaintiff, constituted an agreement between the parties, and that it was a reasonable condition, but that it was unreasonable for the company to insist upon, as they never intended to pay the loss.

*Per ARMOUR, J., following Parsons v. Queen Insurance Co., 2 O. R. 45,* any variation of the statutory condition is *prima facie* unjust and unreasonable.

*Robinson, Q.C., and Miller, for plaintiff.*  
*McCarthy, Q.C., and Nesbitt, contra.*

### HOLDERNESS V. LANG.

*Short form lease—Covenant to repair—Alterations by tenant—Waste—Waiver—Forfeiture.*

Plaintiff leased, under R. S. O. ch. 103, to defendant premises for a grocery and liquor store for five years. Defendant subsequently broke a door through an inside brick wall. Plaintiff at first objected, but afterwards in effect assented. A partition, part glass and part wood, in which was a door, separated office from store. Subsequently defendant began to move this partition nearer the centre of the store, substituting wood for glass, closing the door and converting a front window into a



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door, so as to make the office into a liquor store, in order to comply with the law requiring separation of liquor from groceries. Plaintiff claiming an injunction to prevent further waste, and right to re-enter for breach of covenant to repair; and the judge, at the trial, finding no damage,

*Held*, 1. That making door in wall, if in breach of covenant to repair, was not a continuing one and was waived. 2. That under statutory covenant to repair, tenant being bound to keep in repair both the premises and all fixtures and erections made during term, he had right to erect or make such fixtures, etc. 3. Plaintiff's reversion not being injured there was no waste or forfeiture.

*MacLennan*, Q.C., for plaintiff.

*MacLaren*, contra.

#### MOORE V. MITCHELL.

*Libel—Pleading in mitigation of damages.*

In libel a plea in mitigation of damages must in its nature admit plaintiff's right to some compensation; but it amounts to a contention that the recovery shall be limited to value of plaintiff's character, which value is affected by the facts pleaded.

Such pleas, based upon plaintiff's bad character, must either shew plaintiff a man of bad general reputation or character, or a bad character with regard to some specific act relating to the charge in the libel complained of.

It is not open to a defendant to plead justification to libel, and under such defence to offer evidence of plaintiff's bad character in mitigation of damages.

*Marsh*, for motion.

*Millar*, contra.

#### GOLDSMITH V. CITY OF LONDON.

*Municipal corporations—Defective sidewalk—Negligence—Misdirection.*

The plaintiff, while crossing a certain street in the city of London, stumbled against the end of a sidewalk—which was constructed of asphalt, boxed in with boards, and was some four inches higher than the crossing,—fell and received severe injuries.

*Held* (WILSON, C.J., dissenting), evidence of negligence that must have been submitted to

the jury, and that they, having found in favour of the plaintiff, their verdict could not properly be interfered with.

*Held*, also, that it was no misdirection to tell the jury that they were at liberty to infer that there was no evidence of it; that if the roadway was at that level when the accident occurred it had been filled up between then and the examination of it by the defendant's witnesses.

*R. M. Meredith*, for plaintiff.

*W. R. Meredith*, Q.C., contra.

#### IN RE KNIGHT V. UNITED TOWNSHIPS OF MEDORA AND WOOD.

*Prohibition—43 Vict. ch. 8, s. 14—48 Vict. ch. 14, s. 1—Colonization road—Title to land.*

*Held*, that a prohibition would not lie to the fourth Division Court of the District of Muskoka, no notice having been given, as required by 48 Vict. ch. 14, sec. 1, amending sec. 14 of 43 Vict. ch. 8, disputing the jurisdiction of said Court; and that in any case prohibition would not lie in this case, the title to the road upon which the injury complained of arose not being in question, the road being a colonization road built by the Government before the organization of the townships of Medora and Wood as a municipality, and the question arising not being one of title, but of liability to keep in repair a road so built.

*Arnoldi*, for motion.

*Pepler*, contra.

#### LAXTON V. ROSENBERG.

*Ejectment—Receipt of rent after action brought—Waiver—Intention.*

In an action of ejectment, plaintiff alleged a demise to defendant as a monthly tenant. Defence, a yearly tenancy. After notice to quit, plaintiff received from defendant a payment of rent.

*Held* (affirming the judgment of ROSE, J., at the trial), that there is no distinction in principle between the effect of the payment of rent as such, after action brought, upon the determination of the tenancy by notice to quit and by forfeiture, and therefore the payment of rent in this case after action brought

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had no effect whatever upon the action, either as a bar to it or as a waiver of the notice to quit.

*Held*, also, that the intention with which the rent was received must be taken into consideration, and *Doe dem. Cheney v. Batten*, Cowp. 243, approved.

*Croft v. Lumley*, 6 H. L. Cases, commented on.

*S. M. Jarvis*, for motion.

*Watson*, contra.

#### DEVERILL V. COE.

*Action for possession by purchaser at tax sale.*

Lands in question were, in 1879, assessed as non-resident. The defendant came to reside on them during that year, and paid taxes to the regular collector, whereas, under the Assessment Act the treasurer is the proper party to receive.

No notice was given of arrears to the then owner, and they were not put on the roll for 1882, as required by the Act.

The owner paid all taxes subsequently demanded of him, including those for 1882, but the lands were nevertheless put up and sold for a trifling sum.

*Quare*, per WILSON, C.J., whether there was not in this evidence that the lands were not sold in a "fair, open and candid manner."

*Held*, tax sale void, as taxes under the circumstances were not in arrears.

*Held*, per ARMOUR, J., the substantial performance of the provisions of R. S. O. cap. 180, secs. 108, 109, 110 and 111 is a condition precedent to the right of sale, and as there was no performance of these attempted the sale was bad.

Remarks of WILSON, C.J., on the impropriety of tax sales as now conducted under legislative authority.

*McCarthy*, Q.C., and *J. E. Robertson*, for motion.

*H. W. M. Murray*, and *Delamere*, contra.

#### MCQUAID V. COOPER.

*Provisional judicial District of Thunder Bay—47 Vict. ch. 14, secs. 4, 5—Title to land—Jurisdiction.*

*Held*, that the jurisdiction conferred on the District Court of the provisional judicial District of Thunder Bay by 47 Vict. ch. 14, secs. 4 and 5, is not subject to the exceptions to the general jurisdiction of the County Courts mentioned in R. S. O. ch. 43, sec. 18, and that, therefore, that District Court has power to try actions in which the title to land comes in question.

*Watson*, for motion.

*Aylesworth*, contra.

#### MILLER V. CONFEDERATION LIFE ASSURANCE CO.

*Life assurance—Suppression by insured—Right to begin at trial—Discovery of new evidence—Direction to jury—New trial.*

At the end of questions in an application for insurance, made in December, 1883, and forming part of the application, was an agreement signed by insured stating that he warranted and guaranteed that the answers to the said questions, were true to the best of his knowledge and belief, and he also agreed that the application should be the basis of his contract, and that any misstatement or suppression of facts in the answers to said questions or in his answer to the medical examiner should render the policy null and void. The proposal and declaration were also made the basis of the contract.

Endorsed on said application were answers given to questions by a medical examiner, and at the end thereof, a certificate, signed by insured, stating that he had made full, true and complete answers to the questions propounded by said examiner, and agreed to accept the policy on the terms mentioned in the application.

In answer to a question whether he had had any serious illness, local disease, or personal injury, and if so of what nature, insured answered, "No, except a broken leg in childhood."

There was an answer to a question giving one T.'s name, as that of his usual medical attendant, and in answer to another question, whether he had consulted any other medical man, and if so for what and when, insured replied, "Dr. A., for a cold."

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Insured had been thrown from a load of hay, and on his examination in a suit for damages against the municipality he swore he had been five weeks in bed suffering from his chest, and was at that time unfit for work of any kind, and had been attended by three doctors. No mention was made of this accident or of the doctors.

In reply to a question whether his grandparents, etc., brothers, etc., ever had pulmonary or other constitutional disease, he replied, "No," and he also stated in reply to questions as to what disease his brother had died from, that he had died from over-growth.

It was shown that an elder brother had been treated by Dr. A., some years before for pulmonary affection, and that insured had said that the brother who died had bled at the lungs, and had been ill for some months before he died. Insured, also, in answer to a question whether any material fact bearing on his physical condition or family history had been omitted, replied "No."

Defendants admitted policy, proofs of death, probate, etc., and accepted burden of proof in pleadings and at the trial, and claimed the right to begin, which was refused.

On motion in Term, copies of letters and documents signed by insured, sent to the Government for leave to remain off a homestead in the North-West, and showing that he had been suffering from congestion of the lungs and illness, from the spring of 1883 to the spring of 1884, were produced. It was shown that the existence of some such documents had been suspected, and that they had been searched for in all the Government offices, but could not be found, and that defendants received them the day after the trial.

*Held*, that the plaintiff had the right to begin, notwithstanding such admissions.

WILSON, C.J., reserved the consideration of the admission of the new evidence.

*Per* ARMOUR, J.—It could not be received, as it was merely corroborative, and its suspected existence would have been ground for asking to have the trial postponed.

*Per* WILSON, C.J.—There should be a new trial. There was evidence to go to the jury as to the truth of answer given respecting the health of the deceased brother. The jury should have been asked to say whether the answer as to inquiries was a misrepresentation in fact: that the certificate meant the answers were given upon a knowledge of the

facts, and upon insured's belief in the truth of those facts; and a statement made without knowledge would not be protected by the formula, "best of knowledge and belief," if insured had no knowledge; nor would such statements be protected if made regardless of insured's belief in the truth of such knowledge as he had. The proposal was a warranty that the answers were true according to *the best* of his knowledge.

*Per* ARMOUR, J.—The direction to the jury, whether insured had stated to the best of his knowledge and belief the truth, in regard to deceased's brother, was sufficient.

As to the accident, it was one which ought to have been mentioned, but it was probably considered of too little importance by insured, or else had escaped his memory at the time of the application, and it was sufficient for the jury to have found insured did not wilfully withhold the fact, but answered to the best of his knowledge and belief; and the proposals were not warranties.

The Court being equally divided, the motion for a new trial was dismissed with costs.

S. H. Blake, Q.C., and A. Cassels, for motion.

McMichael, Q.C., McCarthy, Q.C., contra.

#### ARSCOTT v. LILLEY AND HUTCHINSON.

*Keeping a bawdy-house—Habeas corpus—Penalty under 31 Car. II. ch. 2, sec. 6.*

Defendant L., a J. P., convicted plaintiff for keeping a bawdy-house, sentencing her to six months' imprisonment, after undergoing two months of which she was released on bail pending appeal to sessions. Appeal was dismissed, and plaintiff again arrested on L.'s warrant, under advice of defendant H., County Crown Attorney. She was discharged on habeas corpus under latter warrant, because it did not take into account the two days' imprisonment. She was again arrested, under warrant issued by same justice, upon the original conviction. In an action brought by plaintiff, for penalty of £500, awarded by sec. 6 of 31 Car. II. ch. 2.

*Held*, reversing Cameron, C.J., at trial, that that section of the act does not apply where prisoner confined upon a warrant in execution.

*Held*, also, that warrant in execution issued by convicting justice on discharge of prisoner from custody, for defects in former warrant, was the legal order and process of the Court having jurisdiction in the cause.

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*Seemle*, the warrant issued after the dismissal of the appeal by the sessions, and which the original conviction in directing imprisonment for six months, without allowing for the two days, was not open to objection.

Galt, J.]

## REGINA V. RAMSAY.

*Can. Temp. Act, 1878—Secs. 105, 111—Jurisdiction—Crierari—Appeal to Q. S.—Conviction quashed.*

Where a defendant submits to examination before a magistrate it is too late afterwards to object to its propriety.

In cases where a magistrate has jurisdiction, *crierari* is absolutely taken away; but an appeal to the quarter sessions still exists which, however, is also by sec. 111 of the Canada Temperance Act, 1878, taken away where the conviction is before a stipendiary magistrate.

It is imperative under sec. 105 of the above act, that an information thereunder be laid before two justices, and that they both be named in the summons to the defendant. Where, therefore, a summons stated that an information had been laid only before the justice who signed it, and yet called upon the defendant to appear before another named justice as well as himself,

*Held*, that the justices had no jurisdiction, and that the defendant's appearing before them did not confer it. A conviction was therefore quashed.

Bell, for motion.

Howson, contra.

O'Connor, J.]

## REGINA V. ELI.

*Quashing conviction—Case tried same day as warrant served.*

Defendant was steward of a "social club," in Walkerton. The members were elected by ballot, and on paying an entrance fee of \$1, and a subscription of 25 cents per month, were entitled to use the club rooms, and buy from the steward spirituous liquors. The members were not responsible for goods ordered, or for any general expenses. An information was laid against defendant on 10th September, 1885, for an offence against the second part of the Canada Temperance Act, 1878, and on the 21st September, 1885, he was, about 3 p.m., served with a summons to appear at 8.30 a.m. next day before two magistrates. On the 22nd day of

September, informations were in two other cases laid against him for similar offences, and he was in each, at 8.15 a.m., served with a summons to appear before the magistrates at 9 a.m. that day. When the magistrates met, the first case was partially gone into, and before it was closed the prosecutor asked the magistrates to take up the second and third cases. The defendant stated that he had not understood what the summonses meant, and by advice of counsel refused to plead. The magistrates entered a plea in each case of not guilty, and went on with both cases. The evidence in both showed that the offences charged in each case occurred on dates different from those laid in the information. The magistrates amended the dates in the informations. The defendant and his counsel were in Court all the time, awaiting completion of the evidence in the first, but refused in any way to plead or take part in the second and third cases, or to ask adjournment thereof. The magistrates, after taking all the evidence therein, at request of defendant, adjourned the first case, and in the second and third cases convicted the defendant of the offences as charged in the amended informations. It was shown by affidavits that the magistrates were willing in these cases, had defendant pleaded, to adjourn after taking the evidence of the witnesses present. There were affidavits showing that the magistrates had been before the Scott Act interested in promoting temperance.

The convictions were quashed, with costs against complainant, on the ground that the proceedings were contrary to natural justice, as the summonses were served almost immediately before the sittings of the Court which defendant was called to attend.

*Regina v. Klemp*, 10 O. R. 143, was followed as to the charge of interest.

H. J. Scott, Q.C., for motion.

Alan Cassels, contra.

O'Connor, J.]

## REGINA V. REED.

*Mun. Corps.—By-law—Anticipating legislation—Conviction quashed.*

A conviction for infraction of a by-law was quashed, the by-law having been passed 27th March, to take effect 3rd April next, in expectation of 45 Vict. ch. 24 (O.), passed 10th March, to go into operation 2nd April following.

Dickson, Q.C., for motion.

G. Henderson, Q.C., contra.

Com. Pleas.]

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[Com. Pleas.]

## COMMON PLEAS DIVISION.

DIVISIONAL COURT, MARCH 6.

SCOTT V. CRERAR.

*Libel—Publication, evidence of—Nonsuit.*

Action for libel. The alleged libel being contained in certain letters or circulars written on a type writer, sent to several members of the legal profession in Hamilton, imputing unprofessional conduct to the plaintiff in sending "bummers" around touting for business; and inducing the clients of other solicitors to leave them and employ the plaintiff's firm. There was no direct evidence to shew that the defendant was the writer; and the plaintiff relied on circumstantial evidence as proving the fact. As part of the plaintiff's case the defendant's examination before trial was put in by plaintiff, and which contained a denial by the defendant that he was the writer.

*Held* (ROSE, J., dissenting), that on the evidence, as set out in the case, there was not sufficient to go to the jury to prove that defendant was the writer, and that a nonsuit was properly entered.

*McCarthy*, Q.C., for the plaintiff.

*Robertson*, Q.C., and *MacKelcan*, Q.C., for the defendant.

## RE MASSEY MANUFACTURING CO.

*Company—Increase of capital stock—Notice by Provincial Secretary—Municipal Act—Mandamus.*

An application was made by the Massey Manufacturing Company to the Provincial Secretary for the issue of notice under his signature pursuant to sub-sec. 18 of sec. 5 of 27 & 28 Vict. ch. 23, for publication, as required by said Act, the application stating that a by-law of the company had been passed increasing the capital stock thereof by \$300,000, making the total capital stock \$500,000, and declaring the number and amount of the shares of the new stock to be 30,000 shares of \$100; that none of the said stock had been subscribed for, and nothing paid thereon. A duly authenticated copy of said by-law was filed on the application to the Provincial Secretary.

*Held*, that the duty of the Provincial Secretary in the matter on the issuing of the notice was ministerial; and that on the requirements of the statute being complied with the Provincial Secretary had no discretion in the matter, but must issue the notice.

*Held*, also, that the proper mode of enforcing the issue of the notice was by mandamus.

*Robinson*, Q.C., and *Lash*, Q.C., for the applicants.

*Irving*, Q.C., for the Provincial Secretary.

*McCarthy*, Q.C., and *Neville*, for the dissatisfied shareholders.

## CARTER V. GRASETT.

*Easement—Light and air—Implied grant—Equity of redemption.*

P., the owner of lots 8 and 9, by his will devised the same to trustees in trust to sell. In 1869 the plaintiff purchased from the trustees lot 8, on which there was a house with windows overlooking lot 9, immediately adjoining it to the north; the said lot 9 being then open and not built upon. In 1873 the trustees sold lot 9 to Mrs. Priestman, who sold to T., who erected a house thereon. T. sold to G., under whom defendant claimed title. At the time P. became the owner of lot 9, he did so subject to a mortgage thereon, and he continued at the time of his death to have only an equity of redemption thereon. The mortgage was discharged by G., who obtained the usual statutory discharge, which was duly registered by him. The plaintiff claimed that he was entitled by implied grant to the light and air to the said windows, and that the same had been infringed upon by the erection of the house by T.; and he brought this action claiming damages and an injunction.

*Held*, that by reason of P.'s trustees at the time they sold to plaintiff only having an equity of redemption on lot 9, no such implied grant to light and air could arise.

*McCarthy*, Q.C., and *G. Bell*, for the plaintiff.

*Robinson*, Q.C., for the defendant.

Com. Pleas.]

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[Com. Pleas.

# DYMENT V. NORTHERN AND NORTH- WESTERN RY. CO.

*Parol evidence—Admissibility—Consignor and consignee—Who has right to sue—Costs.*

The plaintiff's agent at Gravenhurst shipped two carloads of shingles on defendant's cars. The shipping bill signed by the agent was in the usual form, and requested defendants to receive the undermentioned property in apparent good order, addressed to "N. Dymont (the plaintiff), Wyoming, to be sent subject to their tariff," etc. Then, in the appropriate columns, followed the description of the shingles as

" 3873	shingles	80 m.
	G. T. R.	
	To Henry James, Mitchell.	
8208	shingles	80 m.
	(Sd.) CHAS. BROWN."	

Parol evidence was admitted to shew that the meaning of the shipping bill was that the first named carload was to go to plaintiff at Wyoming; and the other to Henry James at Mitchell; and that the agent so told the defendants' station agent when shipping the goods.

*Held*, that the evidence was properly admitted. An objection was taken in term that the action should have been brought by the consignee, James, because, as was alleged, the evidence shewed that the property had passed to him; but the objection was not raised at the trial or on the pleadings; and if it had been made it would have been shewn that the property was still in the plaintiff; and in any event the consignee, James, consented to be added as a co-plaintiff.

*Held*, that the objection could not now be raised; but even if there were anything in it the Court would allow James to be added as a co-plaintiff.

At the trial the learned judge only allowed County Court costs. On shewing cause to the defendants' motion the plaintiff, who had not moved, asked to have the direction as to costs varied, and full costs allowed.

The Court, under the circumstances, refused to interfere.

*McCarthy, Q.C., and Pepler (Barrie), for the plaintiff.*

*D'Arcy Boulton, Q.C., for the defendants.*

# PIRIE V. WYLD.

*Letters written without prejudice—Admissibility.*

Letters written or communications made without prejudice or offers made for the sake of buying peace, or to effect a compromise, are inadmissible in evidence, it being considered against public policy, as having a tendency to promote litigation and to prevent amicable settlements; but it may be said that no ground of public policy requires that a letter written to intimidate containing an admission should be held inadmissible.

Where a letter, written without prejudice, was deprecatory and complaining, rather than abusive, or with the object of intimidating, and written for the purpose of expressing the writer's views on the matter of litigation, and contained offers of settlement or compromise, it was held to be inadmissible.

*G. T. Blackstock, for the plaintiff.*

*McCarthy, Q.C., contra.*

O'Connor, J.]

# FUNSTON V. CORPORATION OF TILBURY EAST.

*Municipal corporations—Drainage by-law—Revision of assessments by Court of Revision—Necessity for alterations in by-law—Locus standi—Motion to quash—Whether to Divisional Court or single judge.*

In a drainage by-law the assessments as made by the engineer and contained in the schedule to the by-law were revised by the Court of Revision, and alterations made; but the by-law was not amended before being finally passed so as to correspond with such alterations as required by section 571, subsection 2 of the Municipal Act of 1883, it being impossible to discover from the alterations as made the amount of the "total special rate" against each lot or part of lot, and therefore the amount to be annually levied, which is to be ascertained by dividing such total special rate by the number of years the by-law was to run, which in this case was fifteen years.

*Held*, that the defect was fatal to the by-law.

The *locus standi* of the applicant herein was objected to, but on the evidence the objection was overruled.

Com. Pleas.]

NOTES OF CANADIAN CASES.

[Com. Pleas.]

In moving to quash a by-law the practice having been adopted of applying to a judge sitting alone, an objection that the application should have been to the Divisional Court was not entertained. Such an application, if required to be made to the Divisional Court, must be to the common law Divisional Courts, and not to the Chancery Divisional Court.

*Pegley* (of Chatham), for the applicant.

*Moss*, Q.C., contra.

O'Connor, J.]

RE DUNN AND CORPORATION OF  
PETERBOROUGH.

*Municipal law—Manufactories—Exemption—Public policy—Municipal Act, 1883, sec. 368, 47 Vict. ch. 34, sec. 8 (O.)*

The Municipal Act of 1883, sec. 368, as amended by 47 Vict. ch. 32, sec. 8 (O.), authorized a municipal council to exempt any manufacturing establishment, in whole or in part, from taxation for any period, not longer than ten years.

A by-law of the town of Peterborough recited that a company had acquired several water privileges on the river Otonabee, and intended developing same by erecting thereon factories of different descriptions; and it was advisable, in the interests of the town, that the privileges, immunities and exemptions thereafter mentioned should be granted. It further recited that the total assessment of the said water privileges and the lands in connection therewith amounted to \$50,000. The by-law then enacted that the aggregate assessment of the said properties should be and remain for ten years, at the sum of \$50,000; and the assessors from time to time were required to assess same at said sum, notwithstanding the erection of any buildings, etc., thereon.

*Held*, not a by-law within the said section as amended; and also that it was opposed to public policy and morality in directing the assessors from time to time to limit their assessment.

*Shepley*, for the applicant.

*Robinson*, Q.C., and *Edwards* (of Peterborough), for the defendants.

O'Connor, J.]

GORING V. LONDON MUTUAL INSURANCE  
COMPANY.

*Insurance—Variation of statutory conditions—Fire Insurance Policy Act—Dominion Act—Mutual Insurance Co.—Attorney-General—Minister of Justice.*

The defendants, a mutual insurance company, were incorporated by an Act of the Dominion Parliament, 41 Vict. ch. 40, by sec. 28, of which it is provided that "any fraudulent misrepresentation contained in the application therefor, or any false statement respecting the title or the ownership of the applicant, or his circumstances, or the concealment of any incumbrance on the insured property, or the failure to notify the company of any change in the title or ownership of the insured property, and to obtain the written consent of the company thereto, shall render the policy void."

*Held*, on demurrer, that the matters provided for by the above section were subject matters of the Fire Insurance Policy Act of Ontario, and over which the Province has exclusive jurisdiction; and although they might be proper subjects of legal contract, they would have no force or vitality through the Dominion Act *per se*, but only by being used as required or modified by said Ontario Act, namely, in the manner provided for variations to the conditions therein contained.

*Citizens' Insurance Co. v. Parsons*, and *Queen's Insurance Co. v. Parsons*, 7 App. Cases 96, commented upon.

The 28th section of the Mutual Fire Insurance Companies' Act, 1881, makes the Fire Insurance Policy Act applicable thereto, "except where the provisions of the Act respecting Mutual Fire Insurance Companies are expressly inconsistent with, or supplementary, and in addition, to the provisions of the Fire Insurance Policy Act."

*Held*, this includes all Mutual Insurance Companies doing business in the Province; and it was not alleged in the pleadings herein that there was anything in the defendants' Act "expressly inconsistent with" the Fire Insurance Policy Act, but merely that the matters were variations, etc., of the statutory conditions.

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

*Held*, also, that the questions, so far as raised, were not of a constitutional character, so as to require notice to the Attorney-General of the Province, and the Minister of Justice of the Dominion.

*Osler*, Q.C., for the plaintiff.

*Moss*, Q.C., for the defendants.

### CHANCERY DIVISION.

Divisional Ct.]

[March 6]

#### INGALLS v. McLAURIN.

*Mortgage—Subsequent purchaser covering mortgaged property—Concealment.*

The judgment of Cameron, C. J. C. P., reported *ante* p. 68, sustained.

*Per* BOYD, C. If the defendant did know as a matter of fact, the legal effect of G's action in buying the property, he should have disclosed it to the plaintiff before he sought to acquire the equity of redemption from him by means of a conveyance, of which the obvious intent was only to procure his wife's dower to be barred; if he did not know the effect of it, the equity of redemption was not in his contemplation as a property to be acquired from the plaintiff.

*W. Nesbitt*, for the appeal.

*J. R. Roaf*, contra.

Divisional Court.]

[March 6.]

#### COTTINGHAM v. COTTINGHAM.

*Funds in Court—Assignment—Notice to Accountant—Stop order—Notice to the Court.*

H. M. C., being entitled to certain moneys in Court, obtained certain advances from A. H., and gave him a power of attorney to endorse any cheques issued to him by the Court and repay himself. Subsequently H. M. C. obtained another advance from W. H. and assigned all his interest in the funds in Court to H., which assignment was duly filed in the accountant's office and entered in the accountant's books, and acted on for three years. W. A. H. recovered a judgment against H. M. C. H. had no notice of A. H.'s power of attorney for the amount due him in December, 1883, and obtained a stop order in October, 1885.

On a motion for payment out to A. H. which was resisted by W. H. who claimed all the moneys under his assignment. It was

*Held*, that the Court is the custodian of the fund and not the accountant, and that notice to the accountant of an assignment of funds in Court is not tantamount to notice of the assignment of a trust fund to a private trustee, and that a stop order is the proper way of perfecting such a security.

*Per* BOYD, C.—It was not necessary for A. H. to recover a judgment in order to entitle him to a stop order. Payments out under the assignment should not be interfered with as the lodging of the assignment with the accountant was sufficient under the practice to justify payments out in the absence of any claim by A. H. under the first assignment.

*Per* FERGUSON, J.—A. H., having the earlier assignment, is first in point of time, and *prima facie* would be preferred in law and has obtained a stop order which has been held to be the proper way of giving notice to the Court, and thereby perfected his assignment.

*G. H. Watson*, for the appeal.

*J. T. Small*, contra.

Boyd, C.]

[March 10.]

#### SMITH v. McLELLAN.

*Marriage settlement—Power of appointment—Execution of or delegation of power—Vendor and purchaser—Power of revocation.*

In a marriage settlement it was provided that in case there were no children, and W. K. S., the husband, survived his wife, M. M. S., the lands settled were to be held in trust "for such person . . . as he, the said W. K. S., by any deed or deeds with power of revocation and new appointment to be by him signed, . . . or by his last will and testament in writing, or any codicil thereto . . . shall direct and appoint. . . ." W. K. S. predeceased his wife, leaving no children, after making his will, in which he devised to his wife all his real and personal estate, and provided as follows:—"I do also transfer unto her all the powers vested in me to bequeath, convey, execute, by will or otherwise, all or any of certain properties conveyed to her by deed of settlement. . . ." M.



Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

M. S. subsequently appointed the lands to her own use, and made a sale of part of them. On the statement of a special case for the opinion of the Court, it was

*Held*, that the will of W. K. S. was not an execution of the power, but a valid delegation of it to his wife; that an appointment can only be properly made in her favour by a deed with power of revocation, or in favour of another by will, and that a purchaser from her under an execution of the power by deed would not be compelled to accept the title under the power because of its revocable character.

*McMahon*, Q.C., and *Moss*, Q.C., for plaintiffs.

*E. Martin*, Q.C., and *Kittson*, for defendants.

Boyd, C.]

[March 17.]

## LATTA V. LOWRY.

*Will—Construction—Vesting liable to be divested to let in new members of a class—Special case on proper construction of a will.*

*Held*, that the rule laid down in *Hawkins on Wills*, at page 72, appears to be substantiated by the authorities, and is in these words:—"If real or personal estate be given to A. for life, and after his decease to the children of B., all the children in existence at the testator's death take vested interests, subject to be partially divested in favour of children subsequently coming into existence during the life of A."; and the death of any child before the period of distribution does not affect the right of that child's representatives to claim the share of the one deceased.

*Paradis v. Campbell*, 6 O. R. 632, distinguished.

*Moss*, Q.C., *W. Cassels*, Q.C., and *J. Hoskin*, Q.C., for various persons interested.

Boyd, C.]

[March 17.]

## RE KINGSTON AND PEMBROKE RAILWAY COMPANY AND MORPHY.

*Railways—Expropriation of lands—Order for immediate possession—Practice.*

Immediate possession of land, alleged to be necessary for the purposes of a railway, should not be granted to the railway on summary process under the Railway Act unless two points are very clearly established:—First, that the company has an indisputable right to acquire the land by compulsory proceedings; and, second, that there is some urgent and substantial need for immediate action, and inasmuch as these points could not be said to have been clearly established by the affidavits and arguments in this present case, the Court declined to interfere summarily, and dismissed the application of the railway company for a warrant to enter forthwith upon the lands.

*A. J. Cattanach*, for the applicants.

*S. H. Blake*, Q.C., contra.

## MACDONELL V. McDONALD.

*Foreclosure suit—Computation of interest—More than six years' arrears—Action on covenant—Amendment.*

On an appeal from a report of a Master who had allowed more than six years of arrears of interest in taking a mortgage account.

*Held*, that in a foreclosure suit interest, when due for more than six years, will be allowed in taking the mortgage account instead of allowing it for six years only, and compelling the plaintiff to bring another action on the covenant to recover the balance.

*Howeren v. Bradburn*, 22 Gr. 96, commented on. *Allan v. McTavish*, 2 A. R. 278, followed.

*Nelson*, for the appeal.

*Holman*, contra.

Prac.]

NOTES OF CANADIAN CASES—THE HAMILTON LAW ASSOCIATION.

PRACTICE.

Court of Appeal.]

[January, 26.

**HATELY V. THE MERCHANTS' DESPATCH CO. ET AL.**

*Security for costs—Delivery out of bond pending appeal to Court of Appeal.*

The decision of the Queen's Bench Divisional Court, 11 P. R. 9, was reversed on appeal.

McCarthy, Q.C., and Wallace Nesbitt, for the appellants.

Aylesworth, for the respondents.

Boyd, C.]

[March 17.

**BALL V. CROMPTON CORSET CO.**

*Costs—Taxation—Tariff—Foreign witness—Rules of T. T. 1856, 154 and 168.*

The tariff of costs now in force does not pretend to exhaust all possible items or services for which remuneration is to be made. The object of a tariff is to provide a fixed or movable scale for usual and ordinary services, and as to all items embraced therein it is generally conclusive, but for other matters one has to go outside of the tariff to the practice and course of the Court. It is therefore for the taxing officer to determine, according to proper discretion, what allowance to make for procuring the attendance of witnesses who live out of the jurisdiction.

Rules 154 and 168 of T. T. 1856 are still in force.

Akers, for the plaintiffs.

Langton, for the defendants.

THE HAMILTON LAW ASSOCIATION.

We have much pleasure in acceding to the request of the secretary of the Hamilton Law Association to publish the following extract from the last annual report of the Association :—

This Association was formed in 1879, and held its sixth annual meeting on 15th February, 1886. From the report submitted it appears that the Association has steadily progressed until the library now contains upwards of 1,800 volumes of the value of about \$8,000, and the number of members is 70, all of whom paid the annual fees of 1885 six new members being added last year.

The report refers to the need of increased library accommodation, and to the steps taken to obtain the same from the County Council, and then proceeds:

"The increasing influence of the legal profession and the power of making their views known and felt through the means of law associations should be taken advantage of to give expression to any suggestions for the better administration of justice.

"They would call attention to the large list of causes in the Court of Appeal, in which one or more *ad hoc* judges are required, which have been standing over for a long time, and to the necessity for some provision being made for their being disposed of without more delay. As the judges of the Court of Appeal have ceased to go on Circuit, it is believed such a state of things is not likely to occur again, but as the blame for delays generally falls on the profession it is deemed but fair to place it in the proper quarter.

"The block of business in the single Judge Court, and the frequent postponement of cases where counsel are in attendance from a distance to argue them calls for redress.

"Another matter to which they would advert is the postponement of cases, and even the adjournment of Courts to suit the convenience of counsel. This has been noticed more than once in the C. L. J., and while it may on occasion be proper, and even necessary to grant such postponements, the practice has become of too frequent occurrence.

"The trustees recommend the continuance of the Committee on Legislation appointed by them on 6th November last."

The officers of the Association are:—Æmilius Irving, Q.C., President; Thomas Robertson, Q.C., Vice-President; R. R. Waddell, Secretary; A. Bruce, Q.C., Treasurer; Trustees, Edward Martin, Q.C., F. Mackelcan, Q.C., G. M. Barton, J. W. Jones, and J. V. Teetzel.

## CORRESPONDENCE—REVIEWS—FLOTSAM AND JETSAM.

## CORRESPONDENCE.

To the Editor of the LAW JOURNAL :

DEAR SIR,—I send you a list of names which I think would meet the approval of many in the profession. I, at least and some others, intend to vote this list thinking it the best we have seen :

James MacLennan, Christopher Robinson, D. McCarthy, Charles Moss, D. McMichael, John Hoskin, J. K. Kerr, Walter Cassels, James Beaty, J. J. Foy, W. G. Falconbridge, H. W. M. Murray, H. J. Scott, Toronto ; Æ. Irving, Thomas Robertson, F. McKelcan, Edward Martin, Hamilton ; W. P. R. Street, W. R. Meredith, London ; C. F. Fraser, Brockville ; John Bell, Belleville ; B. M. Britton, Kingston ; T. B. Pardee, Sarnia ; A. Hudspeth, Lindsay ; H. H. Strathy, Barrie ; A. S. Hardy, Brantford ; F. H. Chrysler, Ottawa ; C. R. Atkinson, Chatham ; A. Shaw, Walkerton ; H. W. C. Meyer, Wingham. Mr. S. H. Blake is, I believe, a Benchler, *ex officio*, if not his name should be included in the list.

Yours, etc.,

BARRISTER.

## REVIEWS.

PRINCIPLES OF CANADIAN RAILWAY LAW, with the Canadian Jurisprudence and the leading English and American cases, to which is added the Dominion Railway Act, as amended up to 1886, with references to the Provincial Statutes of Ontario and Quebec, forms of proceeding in expropriation, and a complete index. By Chas. M. Holt, L.L.L., of the Montreal Bar. Montreal ; A. Periard, Law Bookseller and Publisher, 1885.

The title page of the book before us would lead one to suppose that there is some marked difference between Canadian railway law, and other railway law, and that the writer intended to call special attention thereto. It occurs to us that it would be better to call the book a short manual of railway law, with references to all the Canadian decisions, and statutory provisions affecting the same. The writer gives his information in an easy and readable way. The arrangement, however, of the matter is not, in all respects, scientific, from a lawyer's point of view, though a good index enables the reader to get at it with sufficient ease. The principal part of the book is taken up with Dominion Railway Act, to which are appended forms for use in Quebec and Ontario, respectively, of proceedings in the expropriation of land for railway purposes.

The writer's connection with a railway office has enabled him to give some decisions not previously

reported, and to seize upon the more salient points of practical utility.

The mechanical execution is very good, reflecting much credit on the publishers.

LEWIS' LAW OF SHIPPING ; being a treatise on the law respecting the inland and sea-coast shipping of Canada and the United States. By Edward Norman Lewis, of Osgoode Hall, Barrister-at-Law. Containing the statutes appertaining down to the year 1885. Carswell & Co., Law Book Publishers, Toronto : 1885.

This can scarcely be called a treatise, inasmuch as the author does not do more than collect under more or less appropriate headings a selection of head notes of decisions from various sources. There is no attempt to deduce principles, or help the student by consideration of doubtful points. It is simply a digest of cases, to our mind not very well arranged, with an appendix containing a number of statutes which bear on the subject of inland shipping, navigation rules, etc., etc. We should hardly have supposed that there was any felt want for a compilation such as this, but it will doubtless be useful to the few if not to the many. Where much labour has been honestly expended one does not like to criticise closely, but we can hardly call the volume a great success in the art of bookmaking.

## FLOTSAM AND JETSAM.

THE following is an extract from a deed, recently in our possession. After describing the parties it proceeds thus :

"Witnesseth that in consideration of the following conditions viz. : that the parties of the third, fourth and fifth part, during the lifetime of the parties of the first and second part, furnish them with a comfortable house, plenty of good wood prepared for use, to be kept well clothed, viz. : 1 new suit every year, 25 bushels wheat, 200 pounds of pork, 100 pounds beef, 25 pounds tobacco, 6 bushels peas, 6 pounds tea, 12 pounds sugar, 6 gallons good liquor, an ever living cow, a horse and carriage when required—to pay all debts, viz. : A mortgage to ——— and in case of sickness the doctor to be brought, when wanted a servant girl ; to keep our granddaughter in a respectable and comfortable manner, and at the age of 21, to give her a cow and feather bed, and at the death of the parties of the first and second part, to be respectably buried with the accustomed Roman Catholic rites."

Twenty-five pounds of baccy seems too much smoking for 6 gallons of good liquor, although 12 pounds of sugar might be appropriate with a due proportion of hot water. An "everliving cow" is irresistibly suggestive of a perennial spring and a chalk pit, whilst the direction that the young woman should be buried on the death of the old people is worse than a "suttee."

# Canada Law Journal.

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APRIL 15, 1886.

No. 8.

## DIARY FOR APRIL.

16. Sun.....*Palm Sunday.*  
17. Fri.....*Good Friday.* Holiday H. C. J. St. George's Day.  
Shakespeare born 1564, died 1616.  
18. Sun.....*Easter Sunday.* Bank of England incorporated  
1694.  
19. Mon.....*Easter Monday.* Holiday H. C. J.  
20. Tues....Primary examination of students and articled  
clerks.  
21. Thur....Graduates seeking admission to Law Society to  
present papers.

TORONTO, APRIL 15, 1886.

THE election of Benchers has resulted in the return of the same men as before, with the exception that Mr. Lash takes Mr. Crickmore's place. The expectations of many amongst the country Bar of seeing a larger representation of those who would endeavour to bring the rights of their brethren in the matter of conveyancing more prominently forward have been disappointed. They were too late in moving in the matter.

## CODIFICATION.

THE question of Codification is again discussed in the last number of the *American Law Review*. A well known writer, after referring to the importance, but vastness of the work, thinks that unless the work is done in divisions or branches of the law, it will probably never be done at all. He instances, as the sort of work to be done, the Act passed in England in 1882, to "Codify the law relating to bills of exchange, cheques and promissory notes." He thus concludes a very able paper:—

"Nor must we form unreasonable expectations of the benefits to be derived from codification, no

matter how well it may be performed. It is not possible, and, therefore, not desirable, to attempt to make any enactment so comprehensive as to embrace all cases or combinations of fact which will arise, nor is it possible to make statutes so clear and precise as to avoid the necessity of judicial interpretation and construction. Besides, the habits, modes of thought, practice, and traditions of a people, or of a great profession like that of the law, are deeply rooted and incapable of legislative extirpation, if it were attempted. Within proper limits the doctrine of Judicial Precedent is reasonable and highly convenient, if not necessary. Its influence has probably pervaded every system of jurisprudence, even where it has been expressly attempted to exclude it, Justinian enacted that cases actually tried by the Emperor should be law, not only for the cases decided, but for all similar ones. The French code prohibits judicial legislation, and under it judicial decisions do not constitute an authoritative rule for other judges in the sense of our doctrine of Judicial Precedent. And the same thing is true, at least, theoretically, of the contemporary Continental codes. The Prussian and Austrian Codes went so far at first as to forbid a judge from referring to the opinion of a law writer or to previous judicial judgments, and the Prussian code expressly directed him to base his decisions upon the statutes and the general principles of the *Landrecht*. But this was afterwards modified in both countries, so that at this time, the decisions of the Supreme Court are regularly published, and we can not doubt that they exercise a weighty influence upon inferior judges, whether they are absolutely binding upon them as precedents or not.

"The sound conclusion would seem to be that 'the law itself should be reduced, so far as possible, to the form of a statute'; not with the expectation that the work of judicial interpretation will be no longer necessary, but with a view to reduce the necessity of judicial legislation and of judicial interpretation to the narrowest possible limits, and to remove as far as may be the existing uncertainty in the law.

"The argument, on the merits, can be summed up, codified, if you please, in a sentence. What is well settled, *can* be expressed, and what is doubtful, *ought* to be made certain, by legislative enactment."

## GLANVILLE.

## GLANVILLE.

THERE are few students of the English law who are not familiar with the name of Glanville, and yet to most modern lawyers Glanville is little more than a name, as we fear very few nowadays deem it worth their while to devote any time to the perusal of the pages of this ancient legal sage. To those who regard the study of the law from a purely utilitarian point of view, it doubtless seems a useless task to study a treatise written some seven hundred years ago; but to the more philosophically disposed student it must always be a matter of interest to trace the various steps by which the vast body of modern English law has from age to age been developed, and among such, at least, Glanville, even in the present day, may count on some few readers.

In the days of Glanville it was thought to be in no way inconsistent with the pursuit of the law, to follow also the profession of arms. That was a warlike and somewhat turbulent age, when the law even sanctioned in civil disputes the trial by duel, and it is therefore not surprising to find that Glanville appears first to have gained distinction as a soldier, when, as sheriff of Yorkshire, he levied the *posse comitatus* to repulse the Scottish King, William the Lion, who had made an incursion into the country. After a rapid march, Glanville attacked and defeated the Scottish king's forces and made him a prisoner.

When the news arrived in London of the capture of the King of Scotland, Henry II. was in bed smarting from the effects of the whipping he had received from the monks of Canterbury on his recent penance at the shrine of St. Thomas à Becket, and he was more inclined to attribute the defeat of the Scottish King to the interposition of that saint, than to the ability and courage of his valiant sheriff. From

this event, however, Glanville appears rapidly to have gained the favour of his sovereign, and he was shortly after promoted to the office of Chief Justiciar, which he held until Henry's death. He afterwards, in the ensuing reign, became a crusader, and perished gallantly fighting in the Holy Land "the enemies of the Cross of Christ."

Concerning the exact date of his celebrated treatise on the laws and customs of England, authorities are in conflict. It is, however, plausibly conjectured from the fact that in two of the precedents which he gives he uses the date, "33 Henry II."; that the treatise was probably written in that year, or in one or other of the remaining three years of that king's reign, which would make its date about 1186 or 1187, just about seven hundred years ago.

Dipping into this, the first systematic book of English law now extant, we get a curious insight into the state of the law in that remote period. We have first a detailed account of the proceedings in a lawsuit to recover land. Even in those days "the law's delay" was not a thing unknown, for we learn that after a defendant had been summoned, he had the privilege of excusing his attendance by "casting essoins"; in other words, presenting excuses such as that he was sick, or beyond the seas, or fighting in the Holy Land; in the latter case he was entitled to a year and a day's delay. These essoins or excuses were required to be proved by oath; but those who were deputed to prove them might themselves also "cast essoins," and it would seem, on the whole, to have been a pretty difficult job to get a reluctant defendant before the Court. The Court in those days had, moreover, a way of dealing out justice which would astonish modern suitors. For instance, if on the day appointed neither the plaintiff nor defendant appeared, the judge might, at

## GLANVILLE.

his pleasure, punish both parties, the one for his contempt of Court, and the other for his false claim.

Having got the parties before the Court, the next step was for the demandant to prefer his claim, which was done in a formal manner, very much in the fashion of an old common law declaration. The demand having been made, it was then open to the defendant to deny it if he could, and if he did, he might then either have the question tried by duel or by a proceeding called the grand assize.

In the former case he appointed a champion, if he did not choose to fight himself, and the plaintiff did the like; but before the battle was finally waged further *essoins* might be cast. Ultimately the parties and their champions appeared in Court and, armed with batons, they proceeded to belabour each other until the stars appeared. If the defendant could hold his ground till then he was successful, and the cause was decided in his favour. If, on the other hand, he or his champion was beaten, he not only had to put up with a battered body but also with the loss of his cause. Lord Coke says that death seldom ensued from such encounters; but it appears from Glanville that the duel was sometimes attended with fatal results; for speaking of the superior merits of the grand assize over trial by battle, he mentions that by the former not only "the severe punishment of an unexpected and premature death is evaded, or at least, the opprobrium of a lasting infamy of that dreadful and ignominious word which so disgracefully resounds from the mouth of the conquered champion."

In the event of defeat the conquered party had to acknowledge his fault or pronounce the word "*cravent*," which is the disgraceful word to which Glanville refers in the passage above cited; otherwise his left foot was disarmed and uncovered as a sign of cowardice; the de-

feated party, moreover, was fined sixty shillings. There was one merit about this mode of trial, and that was, that it was complete and final, and no appeal could be had from the judgment which followed.

Should, however, the defendant prefer it, he might have the controversy decided by the grand assize. This proceeding, Glanville declares, "is a certain royal benefit bestowed upon the people, and emanating from the clemency of the Prince with the advice of his nobles"; and it certainly had the advantage of saving suitors and their friends the inconveniences resulting from cracked heads. Moreover, under it so many "*essoins*" were not allowed, as in the case of trial by battle, and it was altogether a more civilized method of procedure.

This mode of proceeding more nearly coincided with our present mode of trial, but there were some very important differences. After the parties were at issue, a writ was issued to four knights requiring them to elect twelve other knights of the neighbourhood, who were to return on their oaths which of the parties had the better right to the land in question. To the election of these twelve knights either party might take exception on the same ground that witnesses were rejected in the Court Christian. The election being completed, the twelve knights were summoned to Court, and on the day fixed they attended, and if none of them knew the truth of the matter, recourse was then had to others, until twelve could be found prepared to swear that one or the other of the parties was entitled. And if some were in favour of the plaintiff, and some of the defendant, then others were required to be added until twelve at least were found to agree in favour of one side. It will thus be seen that the ancient juror was really a witness, and the sum of the matter appears to be, that a plaintiff, before he could succeed upon a grand assize,

## GLANVILLE.

must have at least twelve witnesses prepared to testify in favour of his claim.

Jurors in those days were under a very strong obligation to speak the truth, for if it were proved that they had perjured themselves they were liable to forfeit all their chattels to the king, and to be imprisoned for a year.

It would sometimes happen, no doubt, that cases would arise where twelve men could not be found to support a claim, no matter how well founded, and in such a case we gather from Glanville that no redress could be had by grand assize, and the only alternative would appear to have been a recourse to the duel.

Before passing on from the consideration of the proceedings in real actions, we may notice one feature which bears a strong resemblance to the third party procedure recently introduced by the Judicature Act.

In Glanville's time, when a man sold land to another he was required to warrant his title, and in the event of the title of the purchaser being called in question in any suit, the latter might cite his warrantor to appear. Upon the appearance of the latter, he might enter into the warranty of the subject of dispute, or decline it. If he adopted the former course, he then became a principal party to the cause, which was thenceforward carried on in his name. If he declined to enter into the warranty, then proceedings were carried on between him and the person citing him, to determine whether he was bound to warrant or not; and if he were found to be liable to warrant, then, in the event of the tenant losing his land, the warrantor was bound to make him a competent equivalent. The tenant was not bound to cite his warrantor, but if he undertook the defence of the action himself and lost, he could not afterwards recover against his warrantor.

In Glanville, too, we may learn something

of the laws affecting that class of the community called villeins, whose status appears to have been little, if anything, better than that of the Russian serfs before their emancipation.

The law of dower, we find, has experienced some changes since Glanville wrote. In his time it commonly meant that property which any free man gave to his bride at the church door. If he named the dower it was confined to that named, provided it were not more than one-third of his freehold land; he might give less, but he could not give more. If he did not name it, then the third part of all the husband's freehold land of which he was seized was understood to be the wife's dower. A man might also endow his wife after marriage with land subsequently acquired, provided the endowment did not exceed the third of all his freehold land; but when the dower was expressly named at the church door, the wife was not entitled as of right to dower in after-acquired lands. Dower in those days, however, was, during the husband's life, in his absolute disposition, and he might sell it, even without his wife's concurrence. Practically, therefore, the right of dower in no way hindered the free disposition of the land by the husband, and this is a point to which modern legislation appears to be again tending.

In Glanville's time we learn that the law of descent was by no means uniform. In some cases the eldest son, and in some the youngest son, was the heir, in others all the sons equally were entitled to the inheritance. The eldest son's title as heir seems to have been confined principally to land held by military tenure, but when the land was held in free and common socage (which is the tenure by which all lands in this Province are now held), the inheritance was equally divisible among all the sons, provided such socage land had been anciently divisible. The eldest

## GLANVILLE.

son, however, in such cases was entitled to the capital messuage, making compensation to the others therefor. The rule in favour of an equal division between all the sons seems rapidly to have been supplanted in favour of the right of the eldest son, so that by the time of King John even socage lands (except in Kent) were held to be descendible to the eldest son only, unless the contrary were proved. There was also a difference as to when the heir of a knight and a soc man became of age; the former not being of full age until he had completed his twenty-first year, while the latter was esteemed of full age when he had completed his fifteenth year.

Another curious feature of the law in Glanville's time was the penalty attached to the offence of usury. Usury, it appears, was committed whenever a person entrusted to another any such thing as consists in number, or weight, or measure, and received back more than he lent. So also, it was considered to be a species of usury if a man received lands in pledge for a sum of money, and entered into the enjoyment thereof upon an agreement that the rents were not to be applied in reduction of the debt. This was not prohibited by the law, yet if any one died having such a pledge, his property was disposed of as the effects of an usurer. Now the punishment of usurers was rather curious, for it was not the custom to proceed against any one for this offence in his lifetime. So long as he lived apparently he had a *locus penitentiae*, but upon it being proved on the oaths of twelve lawful men of the neighbourhood that he had died in the offence, all the chattels of the deceased usurer were seized to the King's use, and his heir for the same reason was deprived of his inheritance, which thereupon reverted to the lord.

Glanville not only discourses on civil proceedings, but he also devotes the con-

cluding book of his treatise to a discussion of the criminal law. For the offence of mayhem, which signified the breaking of a bone, or injuring the head either by wounding or abrasion, the accused was obliged to purge himself by the ordeal, i.e., by the hot iron if a free man, and by water if he were a rustic. The trial by ordeal was a very ancient mode of trial, and seems to have been in existence in England so early as the reign of Ina; and we may conclude these somewhat discursive remarks by stating briefly how the trial by ordeal was conducted according to the laws of Ina. The trial took place in a temple or church. A piece of iron weighing not more than three pounds was placed upon a fire, the fire being watched by two men, who placed themselves on either side of the iron, and who were to determine upon the degree of heat it ought to possess. As soon as they were agreed, two other men were introduced who placed themselves at either extremity of the iron. All these witnesses passed the night fasting.

At daybreak the priest who presided, after sprinkling them with holy water and making them drink, presented them with the gospels to kiss, and then crossed them. The service of the mass was then begun, and from that moment the fire was no more increased, but the iron was left on the embers until the last collect. That finished, the iron was raised, and prayers were addressed to the Deity to manifest the truth. Thereupon the accused took the iron in his hand and carried it the distance of nine feet; his hand was then bound up and the bandage sealed, and after three days it was examined to ascertain whether or not it was *impure*; it being accounted impure, and therefore the accused to be guilty, if it should turn out to have suppurated; if, on the other hand, the sore was found to be healthy, the accused was adjudged to be innocent.

The ordeal by water consisted in the



## RECENT ENGLISH DECISIONS.

accused plunging his arm up to the wrist for inferior crimes, and up to the elbow for crimes of deeper dye, in a vessel filled with boiling water. The other proceedings were similar to those in an ordeal by fire.

And now we may take leave of Glanville, trusting we have not wearied our readers with this little excursion into his domains.

## RECENT ENGLISH DECISIONS.

We continue the cases in the Chancery Division.

## SOLICITOR AND CLIENT—LIEN.

*In re Galland*, 31 Chy. D. 296, is another decision of the Court of Appeal. The application was made by a client against a solicitor for the delivery and taxation of his bill of costs, and also for the delivery up of papers in his custody belonging to the client. The solicitor had been discharged by the client, and insisted on his right to retain the papers in his hands until his lien should be satisfied. But Chitty, J., ordered that the papers should be delivered up on the client paying into Court the amount claimed by the solicitor to be due for costs, together with a sum to meet the costs of taxation. He moreover held that the solicitor's lien is confined to what is due to him in that character, and does not extend to general debts. The parties having agreed that the solicitor should be entitled on delivery up of the papers to receive out of Court a part of the money directed to be paid in, without awaiting the result of the taxation, it became unnecessary for the Court of Appeal to pronounce on that part of the case. They, however, unanimously upheld the ruling of Chitty, J., as to the extent of a solicitor's lien.

## POWER OF APPOINTMENT—RESIDUARY GIFT.

The point involved *In re Hunt*, 31 Chy. D. 308, was a simple one. A testatrix, having a power of appointment over a fund in favour of a class, by her will purported to appoint to the class (which included F. and B.), and also another person not a member of the class in equal shares; and by a residuary clause she

gave all the residue of her estate over which she had any disposing power to F. and B. The appointment being bad as to the share appointed to the person not an object of the power, the question was whether F. and B. were entitled to this share under the residuary gift; and Bacon, V.C., held that they were, and that the share in question did not go as upon default of appointment.

## REDEMPTION—ACTION BY PUISHEN INCUMBRANCES—FORM OF JUDGMENT.

*In Hallett v. Furze*, 31 Chy. D. 312, a question arose as to the proper form of a judgment for redemption where the action is brought by a second mortgagee against the first mortgagee and the mortgagor. The point being whether, on failure of the plaintiff to redeem, the action should be dismissed with costs as to both defendants, or only as against the mortgagee. Kay, J., decided the proper practice is to dismiss the action as to both defendants with costs.

## 6 ANNE, c. 18—PRODUCTION OF CESTUI QUE VIE.

*In re Stevens*, 31 Chy. D. 320, was an application under the statute 6 Anne, c. 18, to compel a person having an interest in land, determinable upon the life of another person, to produce such person. It appeared that one Stevens, who was tenant for life of the property in question, previous to going to sea in 1864, had put his wife in possession of the rents of the property, telling her that she should receive the rents as long as he lived; he had not been heard of since 1866, and an order having been made at the instance of the tenant in remainder requiring the wife to produce her husband, or in default declaring that he ought to be deemed to be dead, the registrar objected to draw up the order on the ground that the wife was not tenant *pur autre vie*, but merely agent of the tenant for life; but Chitty, J., though thinking the registrar had rightly raised the objection, nevertheless came to the conclusion that the case was within the statute, inasmuch as the husband intended the wife to have an interest in the property and was not a mere agent; but he directed a clause to be added to the order, reserving to any party interested liberty to apply to discharge the order.

## RECENT ENGLISH DECISIONS.

SURVIVING PARTNER—MORTGAGE OF ASSETS FOR  
PAST DEBT.

The question before North, J., *In re Clough, Bradford Commercial Banking Co. v. Cure*, 31 Chy. D. 324, was the simple one, whether a surviving partner has power to mortgage the assets of the partnership to secure a debt of the firm. The learned judge held that he has. He says, at p. 327:—

It is clear that the surviving partner could have paid off, out of the assets of the firm, any existing debt, and therefore he could equally well satisfy any creditor by giving security upon a part of the assets.

## PROMOTER OF COMPANY—AGENT—SECRET COMMISSION.

*Lydney and Wigpool Iron Co. v. Bird*, 31 Chy. D. 328, was an action in which the principle established in the celebrated case of *Emma Silver Mining Co. v. Grant*, 11 Chy. D. 118, was sought to be invoked. The defendants were employed by the vendors to form and launch a company to purchase some mines belonging to the vendors; and it was agreed between them that the defendants should receive a commission of £10,800 out of the purchase money of £100,000. The defendants undertook all the business connected with the issuing of the prospectus and bringing out of the company. They subscribed the articles of association, and guaranteed the subscription of the shares offered to the public. The company was formed, and the commission paid by the vendors to the defendants; but the payment of the commission was not made known to the company. On its being discovered, the company brought the present action to compel the defendants to refund it. But on the evidence Pearson, J., held that the defendants could not be deemed to be promoters, but that they were merely agents for the vendors, and that the purchase money had not been increased for the purpose of providing for the payment of the commission, and therefore that the defendants were not liable. In the agreement for sale of the mines, entered into by the vendors with a trustee for the intended company, a stipulation was inserted that the company should employ the defendants to conduct the sales of the company's ores at a commission; which arrangement was to continue until good cause should be shown to the contrary, and this agreement was adopted by

the company on its formation. But it was held that the interest which this arrangement gave the defendants was not sufficient to constitute them promoters, and the action was therefore dismissed.

VENDOR AND PURCHASER—FAILURE OF VENDOR TO SHOW  
TITLE.

*In re Yielding and Westbrook*, 31 Chy. D. 344, was an application under the Vendor and Purchaser's Act, R. S. O. c. 109, s. 3. The vendor had failed to prove title, and the application was made to compel him to refund the deposit with interest, and to pay the costs of investigating, the title, and of the application. Pearson, J., made the order asked, and made the costs a charge on the vendor's interest in the property.

## SOLICITOR—NEGLIGENCE—SUMMARY JURISDICTION.

The only remaining case in the Chancery Division is *Batten v. Wedgwood Coal Co.*, 31 Chy. D. 346, in which it was held by Pearson, J., that a plaintiff's solicitor, who had obtained an order directing certain purchase money to be paid into Court and invested in consols, was guilty of negligence in omitting to take the necessary steps to have the investment made as provided by the order, and was liable to make good to the person entitled to the money the loss occasioned by his omission to get it invested, and that this liability might be enforced by summons in the action.

## EVIDENCE—LEGITIMACY.

Turning now to the Appeal Cases for March, the first calling for attention is *The Aylesford Peerage*, 11 App. Cas. 1, in which the only point of interest decided by the Lords is that although a mother cannot be heard as a witness to bastardise her own offspring born in wedlock, yet statements made by her *ante litem motam* as to its paternity are admissible, not as proof of its illegitimacy but as evidence of conduct.

## COMPANY—TRANSFER OF SHARES—PRIORITY.

*The Societe Generale v. Walker*, 11 App. Cas. 61, is a decision of the House of Lords on a question of some importance. M., the owner of shares in a company, deposited with S. certificates of the shares and a blank transfer as security for a debt. Afterwards he fraudulently exe-

## RECENT ENGLISH DECISIONS—MERCHANTS' BANK V. MONTEITH.

cuted a blank transfer of the same shares, and deposited it with the appellants as security for a debt; he excused the non-production of the certificate by pretending it was lost. The appellants applied to the company to register their transfer, and offered to indemnify the company against the loss of the certificate—the production of which was required as a condition of registration. The company refused the indemnity and declined to register the appellants as transferees, and subsequently the company received notice of the claim of S. The appellants then brought the action to obtain a declaration that they were entitled to the shares as against S. But the Lords (affirming the Court of Appeal) held that S. was entitled to priority, and that the appellants' first giving notice to the company of their transfer gave them no priority over S. whose claim was prior in point of time.

## RAILWAY COMPANY—NUISANCE.

In *The London, Brighton and South Coast Ry. v. Truman*, 11 App. Cas. 45, the House of Lords reversed the decision of the Court of Appeal (29 Chy. D. 89), which we noted *ante*, vol. 21, p. 266. It may be remembered that the appellants, in pursuance of their Act, had purchased property for a cattle yard, and that the action was brought by adjoining proprietors who were annoyed by the bellowing of cattle, and the noise of the drovers, to restrain the defendants from continuing the nuisance. The Courts below held the plaintiffs entitled to the relief, but the Lords were of opinion that as the purpose for which the land was acquired was expressly authorized by the Act, and being incidental and necessary to the authorized use of the railway for the cattle traffic, the company were justified in doing as they had done, and were not bound to choose a site more convenient to other persons, and therefore dismissed the action.

## PAYMENT OF MONEY BY MISTAKE—LIABILITY TO REFUND.

*The Colonial Bank v. Exchange Bank*, 11 App. Cas. 84, was an appeal from the Supreme Court of Nova Scotia, in which the right to recover money paid in mistake was in question. The plaintiffs having instructions to remit R.'s moneys to a bank in Halifax, through mistake of their agents paid them to a New York bank for transmission to the defendants, who, on

being advised thereof, debited the New York bank and credited R. in account with the amount thereof; and on being afterwards advised of the mistake claimed the right to retain the moneys and apply them in reduction of R.'s account with them.

The Supreme Court was of opinion that the plaintiffs, under the circumstances, had no *locus standi* to bring the action, but the Lords of the Privy Council were unanimously of opinion that the plaintiffs had a sufficient interest in the moneys to entitle them to recover them as moneys received to their use.

## REPORTS.

## ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

## MASTER'S OFFICE.

## MERCHANTS' BANK V. MONTEITH.

*Evidence of accomplices—Conflict of evidence—Executor bound by testator's fraud.*

There is no presumption of law against the evidence of an accomplice; but it is the general practice of judges to caution juries not to respect the unsupported testimony of accomplices.

This practice applies in civil cases, to the evidence of a *particeps fraudis*, as much as in criminal cases to the evidence of *particeps criminis*; and to all cases where witnesses are allowed *suam allegare turpitudinem*.

There is a difference between evidence corroborative of a fact, and evidence of the probability of a transaction; and the latter is not corroborative evidence.

In a case of doubt, arising on the conflict of testimony, the decision should be in favour of written documents; of fair dealing instead of forfeiture; and of the lawful, instead of the unlawful, act.

A fraudulent instrument is void against creditors; but not against the party to it or his executors. An executor cannot avoid a fraudulent instrument, but only when he is a principal creditor.

[Mr. Hodgins, Q.C.]

This was a proceeding on a reference back after an appeal from the Master's report. The particu-

## MERCHANTS' BANK V. MONTEITH.

lars of the case are referred to in 21 CANADA LAW JOURNAL, 71, and 10 Ont. Pr. R. 467.

W. N. Miller, and Rae, for plaintiffs.

J. Macgregor, for administrator.

J. A. Paterson, for creditors.

THE MASTER IN ORDINARY.—Under the former reference I had held—not without authority—that the salutary rule of judicial experience, which distrusts the admissions of an accomplice in a criminal act unless corroborated, was applicable to the evidence on the issues of fact in this case.

There is no presumption of law against the evidence of an accomplice. It is not a rule of law, but only a general and prudential practice of judges which, as Lord Abinger said, "deserves all the reverence of law," that juries are cautioned not to respect the unsupported testimony of an accomplice: *Reg v. Farler*, 8 C. & P. 106. The judicial caution only affects the credibility of the accomplice; but if the jury is satisfied of his truthfulness, they may disregard the caution of the judge and give their verdict in accordance with his evidence, and it will not be disturbed: *Reg v. Stubbs*, 1 Jur. N. S. 1, 115. Nor is the caution limited to criminal cases. It is equally applicable to cases of fraud. The rule of the civil law, *Nemo allegans turpitudinem suam est audiendus*, though formerly applied to witnesses, is now only applicable to the case of a party seeking relief. A witness, if an accomplice in a fraud, may be sworn in a civil suit; but a jury would be advised to view his evidence with the same scrupulous jealousy they would that of a *particeps criminis*.

"In cases pregnant with fraud, resting on the attesting witnesses alone, these witnesses must be beyond suspicion; and if at all shaken in credit, no part of their evidence can be relied on:" *Bridges v. King*, 1 Hag. Ec. Cas. 288.

A witness, if *particeps fraudis*, is not legally infamous, and may be sworn in a civil action, as well as a *particeps criminis* in a criminal action; although it would be difficult for a jury to give much credit to him if his participation in the fraud should turn out to be true: *Bean v. Bean*, 12 Mass. 20. The testimony of a witness, who is a participant in a fraud, ought to be strongly corroborated: *Kittering v. Parker*, 8 Ind. 44.

An American text-writer on evidence in civil cases says: "In cases where the statements of a witness are those of a *particeps criminis*, slight credit will be given:" "where the witness is *particeps criminis*, his testimony with corroboration is entitled to little weight:" *Wharton's Evid. Civ. Cas.* §. 414

Equally clear are the opinions of English judges. In *Cotton v. Luttrell*, 1 Atk. 451, the evidence of a

witness was objected to because there was clear evidence of her participation in the fraud and malpractices charged, but Lord Hardwicke held that the objection only went to her credit, not to her competency.

Lord Eldon, in *Howard v. Braithwaite*, 1 V. & B. 302, thus referred to the practice of judges in discrediting witnesses, whose evidence invalidated instruments they had signed: "Lord Mansfield often said he would hear those witnesses, but would give no credit to them. Lord Kenyon followed him in that. I have differed from both these great judges to this extent: that if the witnesses are to be heard, their credit is to be duly examined, but their testimony is to be received with all the jealousy necessarily—for the safety of mankind—attaching to a man who, upon his oath, asserts that be false which he has by his solemn act attested to be true. Every circumstance, therefore, is to be regarded with a strong inclination to believe that which he did was right, and that he swears under a mistake."

And he added if the question was to be tried at law, "I have not doubt a judge would tell a jury, they must look at his evidence with the most anxious jealousy—that the safety of mankind requires it."

In *Boottle v. Blundell*, 19 Ves. 494, the same learned judge again quoted Lord Mansfield as saying that "a witness impeaching his own act, instead of credit, deserved the pillory;" and he then added "Admitting, however, that such evidence is to be received with most scrupulous jealousy, I should not, upon the evidence of those two witnesses, have directed the jury to find any other verdict" than the one which disregarded the evidence of the witnesses referred to.

These references seem to warrant the conclusion that the salutary and prudential practice of judicial cautions to juries to regard with distrust the testimony of a witness, who is an accomplice in a crime, though not a rule of law, applies equally to the testimony of a witness, who is an accomplice in a fraud; in fact, to all civil and criminal cases where witnesses are allowed *suam allegare turpitudinem*.

If during Monteith's lifetime, civil and criminal actions had been instituted respecting these warehouse receipts, Herson would be a competent witness against him. But can it be contended that a judge trying each action would caution a jury as to his evidence in the criminal, and not in the civil action?

Further evidence has been given on this reference, presumably as a corroboration of Herson's testimony. But I do not find that it comes within the definition of corroborative evidence. It can, I

## MERCHANTS' BANK V. MONTEITH.

think, only be read as showing a probability of Herson's evidence being correct, rather than as corroborative of the facts stated by him. One witness, Chapman, proves that Herson was at the warehouse "around there every day," and that he and Monteith "had business together," which would be consistent with the fact of Herson having some right of possession to the warehouse when the goods were stored from Monteith. There is, however, a great difference between evidence of the probability, and evidence corroborative of, a fact. Evidence proving the probability of a transaction, but not going into the transaction or act itself, is not corroborative evidence: *Simonds v. Simonds*, 11 Jur. 830: *Reg. v. Birkett*, 8 C. & P. 732: *Whittaker v. Whittaker*, 21 Chy. Div. 657.

The parol evidence given by Herson on the former reference impeached his truthfulness: upon his oath he asserted that to be false which he had, in the written documents signed by him, attested to be true.

The further evidence on this reference weakens his credibility; while it establishes that Monteith was in every way reliable and trustworthy. It also places beyond question, that Monteith on every occasion represented to the banks that Herson had leased the cellar of his warehouse, which representations the warehouse receipts signed by Herson himself confirmed; and which fact was so found by Rose, J., in *Monteith v. Merchants' Bank* (10 Pr. R. 469).

While there are these strong reasons for not giving Herson's evidence the credit contended for it, there are others illustrated in the cases next referred to, which must also influence the disposal of this case. In *Re Browne*, 2 Gr. 590, it was held, that in cases where parol evidence is admissible to control the legal operation of a written document, no effect should be given to such evidence if its accuracy was involved in doubt. Blake, C. said: "It must be admitted, that, in determining the intention of these parties, their solemn deed upon the subject would be very cogent evidence, under any circumstance. To assume those parties to have had an intention different from that expressed in the deed, upon the parol evidence laid before us, would be, in my opinion, quite unwarrantable."

So in *Cameron v. Barnhart*, 14 Gr. 661, where the evidence was contradictory, it was held that the presumption in a case of doubt must be in favour of fair dealing, and not of forfeiture.

And where the conflict of evidence related to a deposit of title deeds with a bank as security for advances; as alleged by the plaintiffs it would be lawful, but as alleged by the defendant it would be unlawful. The Court in view of these contingencies

decreed in favour of the lawful act, and rejected the evidence of the defendant: *Royal Canadian Bank v. Cummer*, 15 Gr. 627.

Apply these to this case: The parol evidence of Herson throws doubt upon the validity of the written documents signed by him; upon the truthfulness of the representations made by Monteith in his lifetime, and of the written and parol declarations of Herson, immediately prior to, or at the time of, Monteith's death. The decision in such a case of doubt should be in favour of the written documents; of fair dealing instead of forfeiture: and of the lawful, rather than the unlawful act.

Any one of the grounds commented upon would justify my not giving effect to Herson's evidence. Indeed after the parties had heard my former judgment, counsel for the unsecured creditors asked me to find as to Herson's credibility, and I then stated in effect, that if I had so to find, I would have great difficulty in crediting his evidence. Further consideration rather confirms this difficulty; and, therefore, for the reasons stated, I must disregard Herson's evidence, as utterly unsafe to warrant a finding against the validity of these warehouse receipts: *Cotter v. Cotter*, 21 Gr. 159, *Grant v. Brown* 13 Gr. 256.

I had ruled on the former reference, that if those warehouse receipts were fraudulent or void, the defendant Pritchard, as administrator of Monteith, could not impeach their validity on that ground. The cases there cited, and the following, support that view.

A fraudulent instrument is only void against creditors, but not against the party himself, or his executors or administrators; for against them it remains valid: *Hawes v. Leader*, Cro. Jac. 270. An executor or administrator shall not avoid a fraudulent bill of sale as such executor or administrator, but only when he is a principal creditor: *per Holt C. J.*, 13 Vin. Abr. 516.

"The fraudulent alienation," says May, "is good against the rightful executor or administrator, for he is not a creditor, nor does he represent creditors; and, therefore, it is no devastavit for him to deliver the goods to a fraudulent grantee, who can be sued for them by creditors, but not by any other person"; *May on Fraud*. Conv., 60.

An action arising out of the fraud of a testator lies against, and is transmitted to, his executors, they being liable to make good the damage sustained by the misconduct of those whom they represent so far as they have assets: *Per Lord Brougham*, in *Davidson v. Tullock*, 6 Jur. N. S. 543.

I dispose only of the question referred to in the Chancellor's judgment, and re-affirm my former findings. I give no costs. If the cases above re-

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ferred to had been cited on the appeal I think there would have been no reference back.

On appeal, the Master's ruling was affirmed by Ferguson, J., and on re-hearing was varied in part.—See 10 Ont. R. 529.

## NOTES OF CANADIAN CASES.

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LAW SOCIETY.

### SUPREME COURT OF CANADA.

Quebec.]

#### LORD V. DAVIDSON

*Charter party—Deficient cargo—Dead freight—  
Demurrage.*

By charter party the appellants agreed to load the respondent's ship at Montreal with a cargo of wheat, maize, peas or rye, "as fast as can be received in fine weather," and ten days' demurrage were agreed on over and above lying days at forty pounds per day. Penalty for non-performance of the agreement was estimated amount of freight. Should ice set in during loading, so as to endanger the ship, master to be at liberty to sail with part cargo, and to have leave to fill up at any open port on the way homeward for ship's benefit.

The ship was ready to receive cargo on the 15th November, 1880, at eleven a.m., and the appellants began loading at two p.m. on the 16th November. After loading a certain quantity of rye in the forward hold, as it would not be safe to load the ship down by the head any further, the captain refused to take any more in the forward hold. No other cargo was ready, as the respondents would not put the rye anywhere except in the forward hold, and they stopped loading. At eight a.m. on the 19th, the loading recommenced, and continued night and day until six a.m. Sunday, the 21st, at which time the vessel sailed in consequence of ice

beginning to set in. When she sailed she was 214½ tons short of a full cargo. The respondent sued appellants because ship had not received full cargo, and claimed 2½ days 15th, 16th and 17th of November, and freight on 214½ tons of cargo not shipped. The appellants contended delay was not due to them, but to ship in not supplying baggers and sewers to bag the grain.

That the time lost on the first week was made up by night work, and that mere delay in loading could not sustain claim for dead freight.

The Superior Court gave judgment for the respondent for the dead freight, but refused to allow demurrage. This judgment was affirmed by the Court of Queen's Bench (appeal side). On appeal

*Held* (affirming the judgment of the Court below), that as there was evidence that the vessel could have been loaded with a full and complete cargo without night work before she left, had the freighters supplied the cargo as agreed by the charter party, the appellants were liable for damages.

That the demurrage mentioned in the charter referred to, and are over and above the lying days, and have no reference to the loading of the ship.

Appeal dismissed with costs.

*Kerr*, Q.C., for appellants.

*Abbott*, Q.C., for respondent.

Quebec.]

#### COLLETTE V. LASNIER.

*Patents—Validity of prior patent—Infringement  
—Damages—What proper measure.*

In 1877 L., a candle manufacturer, obtained a patent for new and useful improvements in candle making apparatus. In 1879 C., who was also engaged in the same trade obtained a patent for a machine to make candles. L. claimed that C.'s patent was a fraudulent imitation of his patent, and prayed that C. be condemned to pay him \$13,200, as being the amount of profits alleged to have been made realised by C. in making and selling candles with his patented machine, and also \$10,000 damages.

Sup. Ct.]

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C. contended his patent was valid as a combination patent of old elements, and also that L.'s patent was not a new invention. The Superior Court on the evidence found that C.'s patent was a fraudulent imitation of L.'s patent, and granted an injunction, and condemned C. to pay L. \$600 damages for the profits he had made on selling candles made by the patented machine. This judgment was affirmed by the Court of Queen's Bench (appeal side). At the trial there was evidence that there were other machines known and in use for making candles, and there was no evidence as to the cost of making candles with such machines, or what would have been a fair royalty to pay L. for the use of his patent, and that L.'s trade had been increasing. On appeal it was

*Held* (affirming the judgment of the Court below), HENRY, J. dissenting, that L.'s patent had been infringed.

Also (reversing the judgment of the Court below), that the profits were not a proper measure of damages in this case, and that on the evidence only \$100 should be awarded for the infringement.

Appeal dismissed with costs, the judgment of the Court below modified.

*Lacoste, Q.C.*, for appellant.

*Bobidoux, and Geoffrion, Q.C.*, for respondent.

Quebec.]

#### TREMBLAY V. SCHOOL COMMISSIONERS OF ST. VALENTIN.

*Con. Stats. (L. C.) ch. 15—40 Vict. ch. 22, sec. 11, P. Q.—Construction of—33 Vict. ch. 25, sec. 7—(P. Q.)—Erection of a schoolhouse—Decision of Superintendent—Final—Mandamus.*

Under 40 Vict. ch. 22, sec. 11, the Superintendent of Education for the Province of Quebec, on an appeal to him from the decision of the School Commissioners of St. Valentin, ordered the school district of the Municipality of St. Valentin should be divided into two districts with a schoolhouse in each.

The School Commissioners by resolution subsequently decreed the division, and a few days later on a petition, presented by ratepayers protesting against the division, they

passed another resolution refusing to entertain the petition. Later on, without having taken any steps to put into execution the decision of the Superintendent, they passed a resolution declaring that the district should not be divided as ordered by the Superintendent, but should be reunited into one.

In answer to a peremptory writ of mandamus, granted by the Superior Court, ordering the School Commissioners to put into execution the decision of the Superintendent of Education, the School Commissioners (respondents) contended that they had acted on the decision by approving of it, and, that as the law stood, they had power and authority to reunite the two districts on the petition of a majority of the ratepayers, and that their last resolution was valid until set aside by an appeal to the Superintendent.

*Held* (reversing the judgment of the Court of Queen's Bench, appeal side), that the commissioners having acted under the authority conferred upon them by *Con. Stats. L. C. ch. 15 secs. 31 and 33*, and an appeal having been made to the Superintendent of Education, his decision in the matter is final, 40 Vict. ch. 22, sec. 11, P. Q., and can only be modified by the Superintendent himself, on an application made to him under 33 Vict. ch. 25, sec. 7; and therefore, that the peremptory mandamus ordering the respondents to execute the Superintendent's decision should issue.

Appeal allowed with costs.

*Frudel, Q.C., Geoffrion, Q.C.*, for appellants.

*Beaudin*, for respondents.

#### VOGEL ET AL. V. GRAND TRUNK RAILWAY COMPANY.

*Railway Company—Carriage by railway—Special contract—Negligence—Liability for—Power of company to protect itself from—Live stock at owner's risk—Railway Act, 1868, sec. 20, subsec. 4—36 Vict. ch. 43, s. 5—Railway Act, 1879.*

A dealer in horses hired a car from the Grand Trunk Railway Company, and signed a shipping note by which he agreed to be bound by the following among other conditions:—

1. The owner of animals undertakes all risks of loss, injury, damage and other contingencies, in loading, etc.

Sup. Ct.]

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[Sup. Ct.]

3. When free passes are given to persons in charge of animals, it is only on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind on the part of the company or their servants, or of any other person or persons whomsoever, causing or tending to cause the death, injury or detention of any person or persons travelling upon any such free passes. . . . The person using any such pass takes all risks of every kind no matter how caused.

The horses were carried over the Grand Trunk Railway in charge of a person employed by the owner, such person having a free pass for the trip; through the negligence of the company's servants a collision occurred by which the said horses were injured.

*Held*, (*per* RITCHIE, C.J., FOURNIER and HENRY, JJ.), that under the General Railway Act, 1868, sec. 20, sub-sec. 4, as amended by 34 Vict. cap. 43, sec. 5, which prohibits railway companies from protecting themselves against liability for negligence by notice, condition or declaration, and which applies to the Grand Trunk Railway Company, the company could not avail themselves of the above stipulation that they should not be responsible for the negligence of themselves or their servants.

*Per* STRONG and TASCHEREAU, JJ.—That the words "notice, condition or declaration," in the said statute contemplate a public or general notice, and do not prevent a company from entering into a special contract to protect itself from liability.

Appeal dismissed with costs.

*McCarthy*, Q.C., and *Osler*, Q.C., for appellants.

*Ermatinger*, and *Dickson*, Q.C., for respondents.

Quebec.]

#### WYLIE V. THE CITY OF MONTREAL.

*Can. Stat. L. C. ch. 15 and 41 Vict. ch. 6, sec. 26 (P.Q.)—Art 712—Mun. Code P.Q.—Construction of.*

*Held* (GWYNNE, J., dissenting), that property situated in the city of Montreal, and occupied by its owner exclusively as a boarding and day-school for young ladies, and receiving no grant

from the municipal corporation is an "educational establishment" within the meaning of 41 Vict. ch. 6. sec. 26 (P.Q.), and exempt from municipal taxes.

Appeal allowed with costs.

*Kerr*, Q.C., for appellant.

*R. Roy*, Q.C., for respondents.

Quebec.]

#### COUNTY OF OTTAWA V. MONTREAL, OTTAWA & WESTERN RY. CO.

The corporation of the county of Ottawa, under the authority of a by-law, undertook to deliver to the Montreal, Ottawa and Western Railway Company for stock subscribed by them 2,000 debentures of the corporation of \$100 each, payable twenty-five years from date, and bearing six per cent. interest, and subsequently, without any valid cause or reason, refused and neglected to issue said debentures. In an action for damages brought by the railway company against the corporation for breach of this covenant

*Held* (affirming the judgment of the Court below), that the corporation was liable. Arts. 1,065, 1,070, 1,073, 1,840 and 1,841 C.C. reviewed.

Appeal dismissed with costs.

*Laflamme*, Q.C., for appellants.

*De Bellefeuille*, for respondents.

New Brunswick.]

#### SOVEREIGN FIRE INSURANCE COMPANY V. PETERS.

*Insurance against loss by fire—Condition in policy, not to assign without written consent of company—Breach of condition—Chattel mortgage.*

Where a policy of insurance against loss or damage by fire contained the following provision:

"If the property insured is assigned without the written consent of the company at the head office endorsed hereon, signed by the secretary or assistant secretary of the company, this policy shall thereby become void, and all liability of the company shall thenceforth cease."

*Held* (affirming the judgment of the Court below), that a chattel mortgage of the pro-



Q. B. Div.—Com. Pleas.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

perty insured was not an assignment within the meaning of such condition.

Appeal dismissed with costs.

*Lash, Q.C.*, for appellants.

*Hannington*, for respondents.

### QUEEN'S BENCH.

Wilson, C.J.]

REGINA V. CHAYTER.

*Held*, electroplated ware not jewellery within 48 Vict. ch. 40, s. 1, and a conviction for selling same unlicensed was therefore quashed, though the fine had been paid.

*Foster, Q.C.*, for motion.

### COMMON PLEAS DIVISION.

WILSON V. LOUCKS.

*Pleading—Statement of claim—Sufficiency—Municipal Act—Closing up road.*

A statement of claim set out that the plaintiff was the owner of certain land being part of an original road allowance granted and conveyed to him by the corporation, a township; that previous to the execution of the deed by the said corporation by a by-law which had been duly passed by the said council, in accordance with and under the authority of the Consolidated Municipal Act, 1883, the said municipal council had authorized the said corporation to sell the said parcel of land, and to convey the same to the purchaser thereof; that the said by-law was afterwards confirmed by a by-law duly passed by the municipal council, in accordance with the provisions of the said Act.

*Held*, on demurrer, good; that it being alleged that the by-law authorizing the sale was duly passed in accordance with the Act, it must be assumed that all the requirements of the Act have been complied with, and it is not necessary to pick them out and allege performance of each in detail.

*Watson*, for the plaintiff.

*MacLennan, Q.C.*, for the defendant.

### CHANCERY DIVISION.

Divisional Court.]

[March 6.]

RATTE V. BOOTH.

*Riparian proprietor—Reservation in patent of rights of navigation—Ownership of land covered with water—Navigable waters—Nuisance—Damages—Injunction—48 Vict. c. 24 (O.).*

The judgment of PROUDFOOT, J., reported *ante*, p. 23, reversed.

*Per Boyd, C.*—The effect of the patent is to convey the dry land and the land covered by water two chains out, subject to the rights of the public in the Ottawa as a navigable river. As to the land bordering on the water the plaintiff is a riparian proprietor, and has the right to have the water in front of him open for all navigable purposes, and to enjoy it free from extraordinary impurities. Even if the land under the water is vested in the plaintiff's grantor he could not derogate from his grant to the water's edge by polluting, filling up, or otherwise cutting off his grantee from the beneficial enjoyment of the river, still less can the defendants be protected in their wrong doing. The grant to the patentee of the river bed two chains out carries as parcel of it the water thereon, so that we have to this extent the bed, the bank and the water, vested as private property in the patentee, subject to the servitude of a common public right of way for the purposes of navigation.

The term "navigable waters" in the patent is to be construed as referring to water of such a depth and situation as is, according to the reasonable course of navigation, in the particular locality practically navigable. The patentee may rightfully use and occupy the land covered by water, but only so much as will not interfere with the public easement; but every encroachment on the water will be at his peril if it is proved that he is guilty of a public nuisance. There is no evidence to show that the plaintiff's structure (boathouse) is a nuisance, and whatever may be the nature of the plaintiff's title or occupancy of the water, it is enough that his possession and business are as against the public legitimate in order to entitle him to recover as against a wrongdoer. Even if the plaintiff's place of business

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[Chan. Div.—Prac.

was proved to be a nuisance because it invaded the navigable waters of the river, it does not follow that that disposes of the plaintiff's claim for an injunction and damages, as he might well invoke the maxim *Injuria non excusat injuriam*.

*Per* FERGUSON, J.—There is nothing either on the face of the conveyance to the plaintiff or in the surrounding circumstances at the time of its execution to indicate that the grantor intended, if intention could now be of any consequence, to reserve to himself the part of the lot under the water or any right or title to it; the contrary would rather appear from his being in possession at the time and having a boathouse situate as the present one is.

By the conveyance to the plaintiff he obtained title to the lands in the stream embraced in the two chains from the bank, but subject to the right of navigation expressed in the patent. What the plaintiff has done is no nuisance, nor is it shown that he has caused any injury to navigation, and he is entitled to redress for the grievances of which he complains. Even if the plaintiff is not the owner of the land under the water he is entitled to redress for the injuries he has sustained as a riparian proprietor merely.

*MacLennan*, Q.C., for the plaintiff.

*McCarthy*, Q.C., and *Gormully*, contra.

Proudfoot, J.]

[February 26.

RE BRITON MEDICAL AND GENERAL LIFE ASSOCIATION.

*Dominion Winding-up Acts—Insufficient evidence of insolvency—45 Vict. c. 23 (D).*

*Held*, that the evidence of insolvency was not sufficient to satisfy the requirements of the Dominion Winding Acts, and therefore order to wind up the company refused.

*Moss*, Q.C., and *Osler*, Q.C., for the petitioner.

*J. MacLennan*, Q.C., and *Francis*, for the company.

Boyd, C.]

[March 31.

RE GILCHRIST AND ISLAND CONTRACT.

*Short form mortgage—Inadmissible alteration—Personal power—Assignment of mortgage—Power of sale.*

Where, in a mortgage purporting to be made under the Short Form of Mortgage Act, the power of sale was in the following words:—"The said mortgagee on default of payment for two months may, without giving any notice, enter on and lease or sell the said lands."

*Held* (1) that this was a power personal to the original mortgagee, and could be exercised only by him and not by an assignee of the mortgage.

(2) That inasmuch as this form of words did not correspond to the form of words in column 1, No. 14 of R. S. O. ch. 109, and was not either literally or in substance the statutory abbreviated form of words nor a mere extension from or qualification of the form of the statute, but an abolition of one of its most important terms, the benefit of the extended form of words in column 2 of the statute could not be claimed.

# PRACTICE.

Boyd, C.]

[January 12.

MACPHERSON V. TISDALE.

*Attaching debts—Unascertained costs—Set-off—Payment into Court.*

By the judgment in this action the defendant was found to owe the plaintiff \$115, and he was ordered to pay the plaintiff's costs of action, less some interlocutory costs awarded to the defendant. Subsequent to judgment, certain creditors of the plaintiff issued garnishment process from a Division Court, attaching all debts due from defendant to plaintiff. After the taxation of the plaintiff's costs, but before the taxation of the defendant's interlocutory costs, the defendant paid \$115 into the Division Court, having previously paid another sum of \$115 to the sheriff to procure his release from arrest under a *capias* after judgment in this action.

[Prac.]

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*Held*, that the costs coming to the plaintiff constituted an attachable debt before taxation, which was bound by the service of the garnishment process and properly payable into the Division Court after it was ascertained by taxation; and the defendant could not object that his set-off was not ascertained at the time of payment into Court as it was by his own default; and therefore the money paid into Court pursuant to the attachment process was to be taken to be part of the money due to the plaintiff for costs, and not as representing the same debt as the money paid to the sheriff.

*W. H. P. Clement*, for the plaintiff.

*A. H. Marsh*, for the defendants.

Mr. Dalton, Q.C.]

[March 23.]

THE QUEEN *ex rel.* FELITZ v. HOWLAND.

*Municipal election—Quo warranto—Master in Chambers, jurisdiction of—Time—Qualification—Married woman—Municipal Act, 1883.*

The jurisdiction of the Master to grant a fiat for a summons in the nature of a writ of *quo warranto*, to contest the validity of a municipal election, *held* to be established by the 13th sec. of the A. J. Act, 1885.

A summons issued within a month of the formal acceptance of office by the statutory declaration of qualification of office was *held* to be in time, notwithstanding that it was issued more than six weeks after the election, and more than a month after a speech accepting office made by the respondent to a meeting of electors and certain other acts of a similar character, less formal than the statutory declaration.

The respondent was rated on the assessment roll, in respect of a leasehold property, sufficient in value to qualify him for office, but the property was that of his wife, to whom he was married in 1872, and who acquired the property in 1884.

*Held*, that the respondent had no estate in the property in respect of which he was rated, and, therefore, did not possess the qualification required by sec. 73 of the Municipal Act of 1883, (O.)

*Bain, Q.C.*, and *Kappele*, for the relator.

*Robinson, Q.C.*, *Lash, Q.C.*, and *Henry O'Brien*, for the respondent.

Mr. Dalton, Q.C.]

[March 24.]

JENNINGS v. GRAND TRUNK R. W. Co.

*Pleading not guilty by statute—Particulars.*

Particulars were ordered of any defence intended by a plea of not guilty by statute, other than a denial of the facts stated or implied in the statement of claim, and a denial of the legal liability of the defendants to the plaintiff.

*Shepley*, for the plaintiff.

*Aylesworth*, for the defendants.

Boyd, C.]

[March 24.]

CANADA PACIFIC RY. CO. v.

CONMEE ET AL.

*Fraud—Production of documents—Privilege—Particulars—Facts.*

In an action to recover payments made by the plaintiffs to the defendants, who were contractors for the building of the plaintiffs' line of railway, on the ground that the progress certificates upon which the payments were made were false and fraudulent, the defendants asked for (1) production of documents shewing the results of measurements and surveys made by the plaintiffs for the purpose of litigation; and (2) particulars of the matters alleged to be wrong in each certificate complained of.

*Held*, that the documents in question were privileged, even if they were procured, not for this action, but for another action between the same parties; but

*Held*, that the plaintiffs should give particulars of the errors in the certificates on which they relied, and although this might involve the disclosing of matters of fact derived from privileged communications, yet it was no breach of the rule which protects documents so privileged.

Information obtained by means of the measurements and examination of the company's surveyors was not *per se* privileged; the results are matters of fact involving less or more of earth and rock, excavation and filling.

*R. M. Wells*, for the plaintiffs.

*Wallace Nesbitt*, for the defendants.

Prac.]

NOTES OF CANADIAN CASES—CORRESPONDENCE.

Wilson, C.J.]

[March 30.]

## ARMSTRONG V. DARLING.

*Arbitrator—Compensation—Day's sitting—  
R. S. O. ch. 64.*

The day's sitting upon arbitrations mentioned in schedule B to R. S. O. ch. 64, which is to consist of not less than six hours, is to be computed by the number of these sittings of at least six hours' duration, whether they are held upon the same natural day or upon different days, and the compensation to the arbitrators is to be reckoned on that footing.

*W. H. P. Clement*, for plaintiff.

*Delamere, Black, Reesor and English*, for defendants.

Boyd, C.]

[April 3.]

## RE PARR.

*Infants—Bequest—Foreign guardian.*

An application for an order sanctioning the payment of a bequest in favour of certain infants to their father, who with the infants resided in a foreign state, and had there been appointed guardian by a Snrrogate Court, was refused, and the executors were ordered to pay the amount of the bequest into Court.

*Re Andrews*, 21 C. L. J. 428, distinguished.

*Hoyles*, for the application.

Proudfoot, J.]

[April 7.]

## HUTTEN V. WANZER.

*Indemnity—Costs—Solicitor and client—Party and party.*

W. sold land to H., and covenanted to indemnify him against a mortgage thereon.

*Hdd*, that H. was not entitled to solicitor and client, but only to party and party costs against W. of an action on the covenant, although he was entitled in the action to recover his solicitor and client costs of defending an action brought by the mortgagee.

*Hoyles*, for plaintiff.

*W. H. P. Clement*, for defendant.

## CORRESPONDENCE.

## THE CONVEYANCERS' SCANDAL.

*To the Editor of the LAW JOURNAL :*

SIR,—Permit an outsider to add a few lines to the correspondence in your journal respecting the manner in which the business of the country solicitors is cut up by the host of so-called "conveyancers." In towns and cities in the West the professional charge for ordinary deeds or mortgages is \$4; now, to my knowledge, the fees charged by the country conveyancers, storekeepers, saddlers, insurance agents, and the like, range from \$1 to \$1.50 for the same class of instruments! The damage to the legal profession is not merely the large number of instruments which are prepared by these unauthorized amateur conveyancers, but also in the reduction of the fees payable for such work. The country solicitor has to reduce his charges to the low level of his opponents' in order to get business; hence, he suffers in two ways, first, by the loss of the volume of business filched away; and, secondly, by the reduction of the value of the work he does obtain to less than one half of the proper charge. Another evil I would point out is that these non-professional conveyancers poison the minds of the people against the profession; they do not scruple to say, in effect: "If you go to a lawyer you will be fleeced; better let me do the writings." I need hardly dwell upon the grossly inaccurate manner in which the work is performed by these gentry, and which gives great trouble and anxiety to the registrar.

The Ontario Government should pass an Act making it a misdemeanour for any one not holding a "conveyancer's certificate" of fitness to accept any fee or other reward for drawing any instrument affecting lands. The Law Society might provide for the examination of and granting to such persons who can pass a license to practise as conveyancers merely, on a yearly fee of, say, \$10. This would leave the door open for a few thoroughly competent men to continue their business, while it would cut off nine-tenths of the ignorant, unlicensed, unscrupulous persons who are rendering the practice of the law in country places a perfect by-word.

Yours, etc.,

A COUNTY REGISTRAR.

## CORRESPONDENCE—LAW SOCIETY.

## MAGISTERIAL POACHERS.

To the Editor of the LAW JOURNAL :

SIR,—What is the use of spending time and money in becoming a solicitor or a member of the Bar, when it is far more profitable, at least in this country, to be a justice of the peace?

A justice is a power in the land, he exercises great authority in his district, and must be treated with the utmost deference by every legal practitioner, or his client will be considerably harassed, and, to crown all, he receives every consideration and protection from the Superior Courts.

This prominence brings grist to his mill; parties consult him on law matters, he can fine and imprison, draw deeds and wills, take affidavits in proof of execution, obtain probates, attend Division Courts, and, in short, do all a country practitioner's work, without license, without payment of fees, and without any responsibility.

Our Benchers are supposed to look after our interests, but as they have neglected them so long, and there is no prospect of any protection, I intend to leave the profession as soon as I can manage to be appointed a J. P., or can own one.

In some country offices a J. P. is kept as a clerk, and this double-barrelled gun brings down more clients than fall to the lot of a more conscientious practitioner.

Yours, etc.,

CONSIDRIUS.

Collingwood, April 9th, 1886.

LITTELL'S LIVING AGE.—The numbers of the *Living Age* for the weeks ending 27th March and April 3rd contain Grattan, and the Irish Parliament, *Westminster*; The Economic Value of Ireland to Great Britain, *Nineteenth Century*; A Diary at Valladolid in the Time of Cervantes, *Blackwood*; Sebastian van Storck, *Macmillan*; Reminiscences of my Later Life, by Mary Howitt, *Good Words*; A Pilgrimage to Sinai, *Leisure Hour*; A Country Village in the Beginning of the Eighteenth Century, *Longman's*; The Story of the One Pioneer of Tierra del Fuego, *Cornhill*; American Manners, *All the Year Round*; with instalments of "This Man's Wife," and "Caroline," and poetry.

A new volume begins with the number for April 3rd. For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price (\$8) is low; while for \$10.50 the publishers offer to send any one of the American \$4 monthlies or weeklies with the *Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

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## Law Society of Upper Canada.

## SUBJECTS FOR EXAMINATIONS.

## Articled Clerks.

- |                      |   |  |
|----------------------|---|--|
| 1884<br>and<br>1885. | { | Arithmetic.                                |
|                      |   | Euclid, Bb. I., II., and III.              |
|                      |   | English Grammar and Composition.           |
|                      |   | English History—Queen Anne to George III.  |
|                      |   | Modern Geography—North America and Europe. |
|                      |   | Elements of Book-Keeping.                  |

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

## Students-at-Law.

- |       |   |                                  |
|-------|---|----------------------------------|
| 1884. | { | Cicero, Cato Major.              |
|       |   | Virgil, Æneid, B. V., vv. 1-361. |
|       |   | Ovid, Fasti, B. I., vv. 1-300.   |
|       |   | Xenophon, Anabasis, B. II.       |
| 1885. | { | Homer, Iliad, B. IV.             |
|       |   | Xenophon, Anabasis, B. V.        |
|       |   | Homer, Iliad, B. IV.             |
|       |   | Cicero, Cato Major.              |
|       |   | Virgil, Æneid, B. I., vv. 1-304. |
|       |   | Ovid, Fasti, B. I., vv. 1-300.   |

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

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A Paper on English Grammar. Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography. Greece, Italy and Asia Minor. Modern Geography. North America and Europe.

Optional subjects instead of Greek:

## FRENCH.

A paper on Grammar,

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

## LAW SOCIETY OF UPPER CANADA.

## OF NATURAL PHILOSOPHY.

*Books*—Arnot's elements of Physics, and Somerville's Physical Geography.

*First Intermediate.*

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

*Second Intermediate.*

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

*For Certificate of Fitness.*

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

*For Call.*

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any University in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission as a book of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchler, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six

## LAW SOCIETY OF UPPER CANADA.

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchler, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## F E E S .

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

## PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890.

*Students-at-law.*

## CLASSICS.

1886.	Cicero, Cato Major.
	Virgil, Æneid, B. I., vv. 1-304.
	Cæsar, Bellum Britannicum.
	Xenophon, Anabasis, B. V.
	Homer, Iliad, B. VI.
1887.	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. VI.
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. I.
	Cæsar, Bellum Britannicum.
1888.	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. IV.
	Cæsar, B. G. I. (vv. 133.)
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. IV.
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. V.
	Cæsar, B. G. I. (vv. 1-33)
1890.	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. VI.
	Cicero, In Catilinam, II.
	Virgil, Æneid, B. V.
	Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's *Arnold's Composition*, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

## MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

## ENGLISH.

A Paper on English Grammar. Composition.

Critical reading of a Selected Poem:—

1886—Coleridge, *Ancient Mariner* and *Christabel*.

1887—Thomson, *The Seasons*, Autumn and Winter.

1888—Cowper, *the Task*, Bb. III. and IV.

1889—Scott, *Lay of the Last Minstrel*.

1890—Byron, *the Prisoner of Chillon*; Child Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

## HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe. Optional Subjects instead of Greek:—

## FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886)

1888) Souvestre, *Un Philosophe sous le toits*.

1890)

1887) Lamartine, *Christophe Colomb*.

1889)

## OF, NATURAL PHILOSOPHY.

*Books*—Arnott's *Elements of Physics*; or Peck's *Grant's Popular Physics*, and Somerville's *Physical Geography*.

## ARTICLED CLERKS.

Cicero, Cato Major; or, Virgil, Æneid, B. I., vv. 1-304, in the year 1886; and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, or Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe. Elements of Book-Keeping.

*Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.*

# Canada Law Journal.

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No. 9.

## DIARY FOR MAY.

1. Sat.....Last day for filing papers with Sec. Law Society before call or admission.
2. Sun.....1st Sunday after Easter.
3. Mon.....Sir J. Leach appointed M. R., 1827. J. A. Boyd, 4th Chancellor, 1881.
4. Tues.....First intermediate examination.
5. Thur.....Second intermediate examination.
6. Fri.....Lord Chancellor Brougham died 1868, æt. 90.
7. Sun.....and Sunday after Easter. Clergy Reserves secularized 1833.
11. Tues.....Sitting of Ct. of Appeal, and Sitting of Co. Ct. of York for trials begin. Solicitors' Examination.
12. Wed.....Barristers' examination.

TORONTO, MAY I, 1886.

OUR English namesake makes fun of an advertisement:—"To young Barristers—Wanted, one satisfied with fees at conclusion of cases; good start for beginner.—X"; and thinks the main result would be only the consciousness of having degraded the cloth. Young Barristers here would, we presume, be utterly beneath the contempt of their English brethren, for in Canada they are not only glad to get fees after the conclusion of a case, but to get them at all.

THE third year of the Dalhousie Law School at Halifax ended successfully on the 28th April. During the year the school has lost the services of Hon. Mr. Thompson, the present Minister of Justice; but two new lecturers have been added, namely, Mr. Harrington, Q.C., and Mr. Henry, Q.C., making in all a staff of two professors and eight lecturers. The attendance has been about fifty, of whom the following have received the degree of LL.B.:—W. A. Henry, Jr., Halifax; W. D. Carter, Kent, N.B.; Joseph A. Chisholm, Antigonish; Walter Crowe, Truro;

J. A. Macdonald, Halifax; H. V. Jennison, Hants; W. W. Wells, Dorchester, N.B.; W. W. Walsh, Halifax; A. G. Troop, Dartmouth; A. E. Milliken, Moncton, N.B.; H. M. Robertson, Shelburne; and S. R. Thompson, of British Columbia. Mr. Chisholm made the highest general average in the senior year.

It is a matter of surprise to us that no member of the numerous and diligent tribe of legal authors and compilers has ever, so far as we are aware, provided the profession with anything like a complete volume of precedents of mercantile forms; that is to say, of forms of various documents in use among banks, insurance companies, railway companies and business men generally. No doubt, in the appendices of various text-books relating to particular departments, will be found scattered precedents of such forms as we refer to, but we should have thought that a compilation containing within the covers of a single volume good and reliable forms of every kind, especially if there was a reference in the foot notes to any cases in which any of the forms given have passed through the fire of judicial trial, would have a ready sale. To give a concrete example of what we refer to, we were unable to find at Osgoode Hall a form of guarantee to be given by a party wishing to have transferred certain shares standing in the name of another party into his own name, providing that the bank should retain the same lien upon the shares after being so transferred as they would have had if the shares had not been so transferred, in respect to certain bills and notes held by the bank, and which had been discounted



## RECENT ENGLISH DECISIONS.

by them for the said other party. We searched with considerable diligence, but by no means dogmatically assert that such a form was not to be found in some of the books in our admirable library; still it seems to us curious that it should not have been possible to put one's hand at once upon a book containing a form which must so often be required. It is, perhaps, only fair to add, that we did, in Kay & Elphinstone's "Conveyancing Forms," find a form of guarantee to a bank of a current account, from which we were able to extract such clauses as seemed to us to satisfy our immediate requirements. We offer this suggestion to any one who has the diligence to act upon it, subject, of course, to some of our readers being able to enlighten our ignorance as to such a book being already in existence.

## RECENT ENGLISH DECISIONS.

The *Law Reports* for April comprise 16 Q. B. D. pp. 513-672; 11 P. D. pp. 21-30; and 31 Chy. D. pp. 351-503.

## SECURITY FOR COSTS—INSOLVENT PLAINTIFF.

Taking up the cases in the Queen's Bench Division, the first requiring attention is *Rhodes v. Dawson*, 16 Q. B. D. 548, in which the Court of Appeal were called on to review an order of a Divisional Court of the Queen's Bench Division, directing security for costs to be given by a plaintiff in an interpleader issue, on the ground that he was insolvent, and that a receiver had been appointed of his assets. The Court of Appeal held the order to be wrong. An attempt was made to support the order on the authority of *Malcolm v. Hodgkinson*, 8 L. R. Q. B. 209; but the Court of Appeal point out that that case was decided on the ground that the case came within the rule which requires an insolvent plaintiff, suing as trustee for another person, to give security for costs which rule does not apply when the plaintiff, though insolvent, is suing on his own behalf.

## AMENDMENT OF DEFENCE—PREJUDICE TO PLAINTIFF.

In *Steward v. The Metropolitan Tramways Co.*, 16 Q. B. D. 556, the Court of Appeal affirmed the order of Pollock, B., and Manisty, J., which was noted *ante*, p. 99.

## INSPECTION OF DOCUMENTS.

In *Chadwick v. Bowman*, 16 Q. B. D. 561, a Divisional Court of the Queen's Bench Division affirmed an order of Day, J., granting an inspection of documents admitted by the defendant to be in his possession, but which he objected to produce on the ground of privilege, under the following circumstances. A correspondence had taken place between the defendant in an action and persons, other than the plaintiff, which was material to the questions at issue. The defendant had not preserved the letters received by him, nor copies of the letters written by him in the course of the correspondence, but after action brought his solicitor, for the purpose of the defence, procured from such third persons copies of the letters so written and received. Denman, J., says:

The originals of these documents would have been admissible in evidence against the defendant, and it seems to me that there is nothing in the circumstances, under which the copies came into existence, to render them privileged against inspection.

## PERSON SUING IN FORMA PAUPERIS—RIGHT TO BE HEARD IN PERSON.

The simple question of practice the Court of Appeal was asked to pronounce upon, in *Tucker v. Collinson*, 16 Q. B. D. 562, was whether a person who had been admitted to sue as a pauper, but to whom no counsel had been assigned, was entitled to be heard in person. The Court held that he was. Lord Esher's judgment is noticeable for the fact that he denies that the Court is bound to assign a counsel and solicitor to a pauper, when it is of opinion that the claim of the latter is frivolous.

## DAMAGES, MEASURE OF—BREACH OF CONTRACT.

*Kiddle v. Lovett*, 16 Q. B. D. 605, in view of the *Workmen's Compensation for Injuries Act*, 1886, passed at the recent session of our local Legislature, is of some interest. The plaintiffs employed the defendant to put up a platform for the purpose of enabling the plaintiffs to paint a house. This platform, through being insecurely fastened by the defendant, fell, and

## RECENT ENGLISH DECISIONS.

hurt a painter in the plaintiffs' employment. The painter brought an action against the plaintiffs for injuries sustained, under the Employers Liability Act, 1880, from which the Act above referred to is taken, which action the plaintiffs compromised by the payment of £125. The present action was then brought against the defendant for breach of contract, and it was held by Denman, J., that though the defendant was liable under the contract, yet that the plaintiffs having employed a competent person to put up the platform, there was on the facts no evidence of negligence by the plaintiffs, and therefore, they were not liable to their servant for the injury he had sustained, and that the money paid by them to settle his action was therefore not recoverable against the defendant as damages for his breach of contract, and the learned judge therefore gave judgment against the defendant for nominal damages only, without costs.

## ACTION FOR WASTE BY REVERSIONER—MEASURE OF DAMAGES.

*Witham v. Kershaw*, 16 Q. B. D. 613, is another decision on the question of the measure of damages. In this action the plaintiff claimed as a reversioner to recover damages against his tenant for waste committed on the demised premises. The waste complained of consisted in the removal of soil from the demised premises. Matthew, J., before whom the action was tried, held that the proper measure of damages was the sum which it would cost the plaintiff to replace the soil which the defendant had taken, less a discount in respect of the time which would elapse before the reversion would fall into possession; but the Court of Appeal held, that this was an erroneous mode of computing the damages, and that the measure of damages, for breach of a covenant not to commit waste, is not necessarily the same as it is for breach of a covenant to deliver up the property at the end of the term, in the same state as that in which the tenant received it. For while in the latter case, the method of arriving at the damages adopted by Matthew, J., would be correct; the proper mode of estimating the damages in the former case, is to ascertain the actual injury occasioned to the reversion by the wrongful act complained of. In this case it was left to the

Court of Appeal to fix the damages, and it appearing that the land in question was worth about £30 per acre, and that the soil which had been removed would have covered about a quarter of an acre, the damages were fixed at £10.

## LARCENY—INNOCENT RECEIPT OF CHATTEL.

In *The Queen v. Flowers*, 16 Q. B. D. 643, it was necessary to explain *Reg. v. Ashwell*, 16 Q. B. D. 190, noted *ante*, p. 99. The latter case was supposed by the learned recorder of Leicester, to have abrogated the well-established rule of law, "that an innocent receipt of a chattel and its subsequent fraudulent appropriation do not constitute larceny"; but the Court composed of Coleridge, C.J., Manisty, Hawkins, Day, and Grantham, JJ., were unanimous that it had no such effect.

## PARTICULARS—NAMES OF PERSONS TO WHOM SLANDER UTTERED.

The case of *Roselle v. Buchanan*, 16 Q. B. D. 656, was an action of slander, in which the defendant before delivering his defence, applied for an order for the plaintiff to deliver particulars of the names of the persons to whom the alleged slander was uttered. Field, J., had granted the application, and Grove and Stephen, JJ., now affirm his order.

## APPOINTMENT OF NEW TRUSTEES—SENILE IMBECILITY.

In *re Phelps' trusts*, 31 Chy. D. 351, was an application under the Trustee Act, 1850, to appoint a new trustee in place of one who was 85 years of age, and sworn to be and for the past twelve months, to have been, from advanced age and failing memory, mentally incapable of transacting any trusteeship business. Kay, J., thought the evidence showed that the trustee was "a person of unsound mind," and that the petition should therefore have been entitled in lunacy and he dismissed it; but upon appeal, the Court held the trustee was not a person of unsound mind, and that only persons can be said to be "of unsound mind," who would be found insane upon inquisition and they granted the application as being within sec. 32 of the Act.

## INJUNCTION—RESTRAINING UNAUTHORIZED USE OF NAME.

In *London and Blackwall Ry. Co. v. Cross*, 31 Chy. D. 354, an application was made to Chitty, J., for an injunction to restrain the de-

## RECENT ENGLISH DECISIONS.

fendant from using the name of his lessor in a notice to arbitrate under an Act enabling the plaintiffs to expropriate certain rights. The defendant as lessee of these rights, had given a notice in his own name, and in that of his lessors, under the belief that the power of attorney contained in his lease enabled him to do so. The plaintiffs claimed that the use of his lessor's name was unauthorized, and Chitty, J., being of opinion that the lease gave the defendant no power to use the lessor's name, granted the injunction; but on appeal the Court of Appeal reversed his order, holding that though the Court may properly stay proceedings taken before itself in the name of any person without his authority, because such a proceeding is an abuse of the process of the Court, it has, nevertheless, no authority to restrain by injunction proceedings before arbitrators under the Act in question by persons who have no right to compensation. Such questions, they were of opinion, must be fought out in an action upon the award, and could not be determined upon a motion for an injunction.

## DISCOVERY—GENERAL ALLEGATION OF FRAUD.

*Leitch v. Abbott*, 31 Chy. D. 374, is a decision of the Court of Appeal on a question of practice. The plaintiff alleged that he had employed the defendant as a stock-broker, but that the defendant had in many transactions dealt with himself as principal, and had also charged the plaintiff with moneys which he had not paid. The plaintiff delivered interrogatories asking for particulars of the dealings of the defendant on behalf of the plaintiff, and the names of the persons with whom he had dealt, and the amounts paid. The defendant objected to answer on the ground that the plaintiff was not entitled to this information until after decree. But Cotton and Bowen, L.JJ., held that though there were no particulars of the frauds alleged, the plaintiff was entitled to the discovery sought by him, and they therefore reversed the order of Chitty, J., Fry, L.J., doubting.

## BREACH OF TRUST—LIABILITY OF HUSBAND FOR WIFE'S BREACH OF TRUST—RIGHT TO INDEMNITY BY CO-TRUSTEE.

*Bakin v. Hughes*, 31 Chy. D. 390, is a decision of the Court of Appeal, in which the decision of Kay, J., was affirmed. The action was brought by *cestuis que trust* against their

trustees, and the husband of a deceased trustee, to compel them to make good certain losses arising from an improper investment of the trust funds. The investments in question had been made by the defendants Hughes and Burden, but the wife of the defendant Edwards had passively permitted the investment to be made. Two points were made by Edwards—first, that his wife not having actively participated in the improper investment he was not liable, but the Court determined this point against him; and the second point made by him, that his co-defendants were bound to indemnify him, was also held untenable, though as to this Bowen, L.J., expressed considerable doubt. The other members of the Court (Cotton and Fry, L.JJ.) were clearly of opinion that all the trustees were equally in the wrong, and that none of them were entitled to indemnity from their co-trustees. Cotton, L.J., says:—

In my opinion it would be laying down a wrong rule to hold that when one trustee acts honestly, though erroneously, the other trustee is to be held entitled to indemnity who by doing nothing neglects his duty more than the acting trustee.

And Fry, L.J., makes use of the following language:—

In my judgment the Court ought to be very jealous of raising any such implied liability as is insisted on, because, if such existed, it would act as an opiate upon the consciences of the trustees; so that, instead of the *cestui que trust* having the benefit of several acting trustees, each trustee would be looking to the others for a right of indemnity and so neglect the performance of his duties.

## MOTION FOR JUDGMENT OR ADMISSION IN PLEADINGS—(ONT. RULE 322).

The point of practice determined by the Court of Appeal in *United Telephone Co. v. Donohoe*, 31 Chy. D. 399, is deserving of attention. The action was for an infringement of a patent. The statement of defence admitted certain instances of infringement, and denied the commission of any others. The plaintiff moved for judgment under Rule S. C., Ord. 32, r. 6 (Ont. Rule 322) upon the admission in the pleadings. He claimed a general inquiry as to all infringements committed by the defendant, but the Court of Appeal sustained Bacon, V. C., in limiting the inquiry to the

## RECENT ENGLISH DECISIONS.

damage sustained by the plaintiff by reason of the infringements admitted by the defendant. By moving for judgment on the admission in the defence, Lord Esher, M.R., said the plaintiff accepted the statement of defence "and must take the negative as well as the affirmative allegations therein contained."

MARRIED WOMEN'S PROPERTY ACT, 1882, s. 5 (47 VICT., c. 19, SEC. 5, ONT.)

The conflict of decisions as to the proper construction of the English Married Women's Property Act, 1882, s. 5, which is similar in its terms to our own statute, 47 Vict., c. 19, s. 5, (O.), has at last been composed by the Court of Appeal in *Reid v. Reid*, 31 Chy. D. 412. That section, it may be remembered, provides that "every woman married before the commencement of this Act shall be entitled to have, and to hold, and to dispose of in manner aforesaid, as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money and property so gained or acquired by her as aforesaid." The point in controversy has been whether property, to which a married woman prior to the passing of the Act of 1882 had acquired a contingent title either in reversion, or remainder, became her separate property under the Act on its subsequently to the passing of the Act falling into possession. Some of the Judges had held that the title of the wife "accrued" when the estate became an estate in possession, but the Court of Appeal has determined that that is wrong. Cotton, L.J., says, at p. 408:—

In my opinion, considering the section truly and fairly, there must be an accrue of title after, and not before, the passing of the Act, and the title must be considered as accruing when the married woman first acquires her interest in the property, whether such interest is at that time in possession, reversion, or remainder.

Notwithstanding this case, however, it is probable that in this Province a married woman would, under the Act in force prior to 47 Vict., c. 19, be entitled under the circumstances appearing in *Reid v. Reid* to claim the property as separate estate.

## NON-PAYMENT OF COSTS—CONTEMPT—STAYING PROCEEDINGS.

In *Re Neal, Weston v. Neal*, 31 Chy. D. 437, Bacon, V. C., followed the decision of Pearson, J., in *Re Youngs*, 31 Chy. D. 239 (see *ante*, p. 102), and held that the proceedings must be stayed until the plaintiff had paid the defendant certain interlocutory costs she had been ordered to pay. In this case the objection that the plaintiff was in default was taken by the defendant on the action coming on for trial, and was held not to be too late.

## POWER OF APPOINTMENT—REVOCATION—INVALID APPOINTMENT.

The short question in *Duguid v. Fraser*, 31 Chy. D. 449, was whether where a person having a power of appointment by will in favour of a class, executes a will making a valid appointment in favour of the class, but subsequently, on a member of the class dying, adds a codicil purporting to appoint his share in favour of certain persons who were not objects of the power, the codicil could be deemed to be a revocation of the appointment made by the will *pro tanto*. Kay, J., held that it could not, and that the valid appointment made by the will was unaffected by the subsequent invalid appointment made by the codicil.

## WILL—BLANKS LEFT BY TESTATRIX—EVIDENCE OF INTENTION.

In *Re Bacon, Camp v. Coe*, 31 Chy. D. 460, is the second case which has appeared in the reports within the last four months arising out of a testatrix using a printed form of a will and neglecting to fill up the blanks. The other case, *Mr. Harrison*, we noted *ante*, p. 77. In the present case the testatrix, after giving certain legacies, gave all her estate, real and personal, unto — to and for — own use and benefit absolutely, and then appointed C. W. C. to pay all her debts and to be executor of her will. The testatrix was illegitimate, and a contest arose between the Crown and the executor as to the residue: and on the part of the latter parol evidence was offered to show that it was the intention of the testatrix that the executor should have the residue, if any for his own benefit; and it was held by Kay J., that, under the peculiar circumstances, the evidence was admissible to rebut the presump-

## RECENT ENGLISH DECISIONS—IN THE MATTER OF AN APPEAL FROM COURT OF REVISION FOR TORONTO.

tion against the executor arising from the blanks, and as this evidence established it to have been the intention of the testatrix to give the executor the residue for his own benefit, it was so decreed.

## NON-PRODUCTION BY DEFENDANT—JUDGMENT FOR DEFAULT OF DEFENCE.

In *Haigh v. Haigh*, 31 Chy. D. 478, a defendant made default in production. Her solicitor explained to her the effect of the order and the consequences of disobeying it. Her defence was struck out, and judgment was obtained against the defendant for default of defence. An application to set aside the judgment was refused by Pearson, J., on any terms. See *Dunn v. McLean*, 6 P. R. 156.

## MOTION FOR JUDGMENT BY INFANT PLAINTIFF IN DEFAULT OF DEFENCE—EVIDENCE.

In *Ripley v. Sawyer*, 31 Chy. D. 494, Pearson, J., held that on a motion for judgment in a partition action in default of pleading where some of the defendants were infants, it was not necessary to file affidavits to substantiate the allegations in the statement of claim. This is contrary to the practice which has hitherto prevailed in this Province. In *Perry v. Perry*, before Boyd, C., 10th March, 1886, where the plaintiffs were infants, affidavits proving the statements in the statement of claim were dispensed with.

## MORTGAGE ACTION—RECEIPT OF RENTS BEFORE DAY FILED FOR REDEMPTION.

In *Jenner-Fust v. Needham*, 31 Chy. D. 500, Pearson, J., decided that, if between the date of the report and the day fixed for redemption rents are received, either by the mortgagee or by a receiver appointed in the action, those rents must go in reduction of the amount due to the mortgagee and a fresh account must be taken. This decision CHITTY, J. refused to follow in *Farquhar v. Young*, 80 L. T. 339, but it was followed in *Peal v. Nicholson*, 80 L. T. 394, by Kay, J.

This completes our review of the *Law Reports* for April.

## REPORTS.

## ONTARIO.

## ASSESSMENT CASE.

## IN THE MATTER OF AN APPEAL FROM THE COURT OF REVISION FOR TORONTO.

*Ministerial exemptions—Editors of religious papers, and managers of church funds—R. S. O., cap. 180, sec. 6, sub-sec. 23—48 Vict. O. cap. 42, sec. 12.*

In a number of appeals by clergymen claiming the exemption under R. S. O. cap. 180, section 6, sub-section 23, as amended by 48 Vict. (Ont.) cap. 42, section 12,

*Held* (1), that clerical professors in theological institutions for the training of ministers, who were lawfully paid out of church funds, and not by fees; (2) the missionary secretaries, and president of conference, whose whole duty was clerical; and superannuated ministers, not engaged on lay employment, were exempt.

*Held*, also, that clerical editors of religious newspapers and periodicals, and clerical managers of church business institutions were not exempt, as their duties were chiefly of a lay character, and their clerical duties only occasional.

*Held*, also, that a minister living in one municipality and doing only clerical duty in another municipality, was entitled to the \$2,000 exemption on residence.

(Toronto, Dec. 20, 1885—MacDougall. Co. J.)

The facts of the case fully appear in the judgment of—

MACDOUGALL, Co. J.—A number of appeals from the Court of Revision of Toronto were argued before me on the 30th November, raising the question as to what clergymen could legally claim the exemption allowed by sub-section 23, of sec. 6, cap. 180, R.S.O., as amended at the last session of the Ontario Legislature by sec. 12 of cap. 42 48 Vic. (Ontario). The language of the revised statute before amendment was as follows:—"The stipend or salary of any clergyman or minister of religion, while in actual connection with any church, and doing duty as such clergyman or minister, to the extent of \$1,000, and the parsonage or dwelling-house occupied by him, with the land thereto attached, to the extent of two acres, and not exceeding \$2,000 in value." The language of this section as amended by the Act of 1885 is as follows:—(The changes are italicized):—"The stipend or salary of any clergymen or minister of religion while in actual connection with any church, and doing duty as such clergyman or minister, to the extent of \$1,000, and the parsonage, *when occupied*

## IN THE MATTER OF AN APPEAL FROM THE COURT OF REVISION FOR TORONTO.

as such or unoccupied; and, if there be no parsonage, the dwelling-house occupied by him, with the land thereto attached, to the extent of two acres, and not exceeding \$2,000 in value. *This sub-section shall not apply to a minister or clergyman whose ordinary business or calling at the time of the assessment is not clerical, though he may do occasional clerical work or duty.*" Now, in construing an amendment to a statute, one must examine the old law and the judicial construction it has received; and, in the light of any such construction, the language of the amending clause, to learn what, if any, limitation the Legislature has placed upon such construction, or to ascertain if such amendment is intended to give a wider application to the law. It is clear in examining the amendment made by the Act of 1885 that the Legislature intended to give a larger exemption as to parsonages. The old law exempted the parsonage or dwelling-house only when occupied by the parson. The new law exempts the parsonage when occupied as such or unoccupied; and as if to prevent any quibble on the word "parsonage," adds the words:—"If there be no parsonage, the dwelling-house occupied by him," etc., is to be exempt to the value of \$2,000. Then comes the added clause, which limits the application of the whole subsection, and states that it shall not apply to a minister or a clergyman whose ordinary business or calling at the time of the assessment is not clerical, though he may do occasional clerical work or duty. It was argued before me by the City Solicitor that the word "church" in the second line of the section in the Act of 1885 meant congregation, and that the Legislature intended to exempt only those clergymen and ministers in actual charge of congregations; that it was not intended that the exemption should apply to any clergyman or minister who was performing duties assigned to him by his church-governing body, if such duty did not include the actual charge of a congregation. Upon this view of the language of the section under consideration, the President or Superintendent of the Methodist General Conference, the secretaries of the missionary enterprises of any of the churches, the clerical professors in the theological institutions of the various churches, the clerical editors of the magazines and newspaper organs published by the different denominations, the clerical treasurers of the various funds connected with the several religious bodies, and other clergymen assigned by their respective governing bodies to special duty other than having charge of a congregation—all these clergymen, it was argued, were not entitled to claim exemptions for either stipend or residences. It was pointed out by the appellants that the word

"church" in the clause in the revised statute had received judicial construction, and that the County Judges throughout the Province had decided in past years that it meant the church or denomination in the general and collective sense, and not a church or congregation in the narrower sense; and it was argued, with much reason and fairness, that the Legislature must be assumed to have known of this construction, and in re-enacting the clause in 1885 had chosen to repeat the exact language of the revised statute in this particular. I think this contention sound, and upon this view allowed the exemption in the case of Dr. Williams, the Superintendent of the Methodist Church of Canada, whose whole duty was clearly clerical; and upon the same grounds I allowed the appeals of Rev. Dr. Sutherland and the Rev. John Shaw, the Missionary Secretaries of the same church, as it was shown that their duties (to which they had been assigned by the General Conference of the Methodist body) were wholly clerical, their entire time and attention being devoted to the supervision, inspection and assistance in the mission work of the church from the Atlantic to the Pacific, and their stipend was payable wholly out of church funds. The other appeals, relating to the several classes of clergymen covered by the contention of the City Solicitor, I reserved for further consideration, feeling somewhat impressed at the time with the argument that the added subsection was intended to reach some, if not all, of them. These appeals can conveniently be treated under certain distinct divisions, which will embrace a number of individual cases. I have divided them as follows:—1. Professors in theological institutions 2. Clerical editors of religious newspapers and periodicals; 3. Treasurers and managers of various church funds, and managers of other church institutions; 4. Superannuated ministers.

The language of the new portion of the section in the Act of 1885 is that the exemptions to be allowed shall not extend to the case of a minister or clergyman whose ordinary business or calling at the time of the assessment is not clerical. What are we to understand as clerical work? Is it restricted to preaching and the administration of the sacraments? Is it not clerical work to train, educate and prepare others to become clergymen, especially if the position of professor in a theological school, by the rules of the denomination, can only be filled by a clergyman, and if the stipend paid such professor is taken solely from church funds and is not derived from fees payable by the students? It may be argued that the act of the church in establishing the institution, maintaining it by church funds appointing to its chairs clergy-

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men only, its sole object being to educate candidates for the ministry, constitutes the performance of such duties on the part of its professors clerical work. It could also be said that such professors are clergymen in actual connection with the church and doing duty as such clergymen. They yield obedience to the governing body of their denomination, and do the duty appointed them, and the work is regular, not occasional. They preach on Sundays, administer the sacraments to the students, hold religious services with them, and, in addition, on week days lecture and teach them the subjects in which candidates for ordination are required to attain a certain degree of proficiency before they can be licensed to preach themselves. I have arrived at the conclusion, from some of the foregoing considerations—though I am not altogether free from doubt—that it is not straining the construction to be placed upon the Act to hold that the performance of such duties is clerical work, and that the ordinary business and calling of such clergyman, discharging these duties by the order and appointment of his ecclesiastical superiors, is clerical. I therefore allow the appeals of the following gentlemen:—Rev. Messrs. Caven, J. H. Castle, William Gregg, William McLaren, H. McVicar, D. H. Welton, A. H. Newman, J. W. A. Stewart.

The next division of the reserved appeals that I have made are the cases of those clergymen who are appointed by their governing bodies to act as editors of the religious newspapers and periodicals of their several denominations. In the case of these gentlemen I feel much more doubt. It is the aim and object of all laws regulating the question of taxation to lay the burden upon the persons and property of all equally, and all clauses exempting persons and property are to be construed with strictness, and an exemption should be denied unless so clearly granted as to be free from fair doubt. The editorial charge of a religious weekly newspaper or monthly magazine can hardly be viewed as work that is strictly clerical. The contents of a religious newspaper are somewhat varied in character; and though much of the editor's work in such a publication is naturally an appeal to the religious sentiments and instincts of his readers, yet a large portion of the editor's task and duty is to record the various transactions of his religious body, the progress of church work, statistics, items of church gossip, matters of church government and policy; to discuss religio-political questions such as Prohibition, State aid to church institutions, legislation affecting the morals of the community, and kindred subjects. That they do a great deal of good, and are widely read by a

constituency of thoughtful readers, cannot be denied; and possibly, as was argued, the clerical editor may preach to a vastly larger congregation, than could be gathered into the churches. Yet can the ordinary business and calling of a clergyman filling such a position be called clerical? Was it the intention of the Legislature to exempt the stipend and residence of the fortunate editor of the religious newspaper, while his secular brother should be compelled to pay not only his own tax on income and home, but indirectly bear a portion of the burden of the taxes that his reverend confrère casts upon the general community? It was argued that such clergymen, appointed to these positions, were paid out of church funds; that as they retained their clerical status in their own order, notwithstanding their occupation, and as they were allowed to count the years passed by them in the editorial chair as though these years had been occupied by them in doing duty in the pulpit—for these reasons their duties should be considered clerical. I cannot accede to this contention. The internal regulations of their governing bodies upon these matters cannot *ex vi termini* make their ordinary business and calling anything but that of editors. The position is different from that of professors in theological institutions. The latter, in my view, can only claim the exemption when their teaching or preaching is confined to the education and religious training of students intended only for the church, and at the sole expense of the church. Where they are teachers as well of other classes open to other students than catechumens, then I think they fall within the exception in the statute of 1885, and their ordinary business and calling becomes that of teachers and professors; while the clerical portion of their work, in the light of the limitations I have placed upon it, becomes occasional. I therefore disallow the appeals of the Rev. Drs. Withrow, Dewart and Stone.

The third class of appeals are the managers of church funds and business institutions. As to the managers of business institutions, such as book stewards, etc., they fall within the *ratio decidendi* applicable to editors of religious newspapers, and I must therefore disallow the appeal on income of Rev. Mr. Briggs, book steward of the Methodist body—it being admitted that he derived his income solely from this office. As President of the Toronto Conference without salary, it might perhaps be argued that his residence should be exempt, as falling within the decision I have made in the Rev. Dr. Williams' case, as Superintendent of the General Conference of the Methodist Church; but I fear that the duties and responsibilities of his

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office as book steward, with which the whole of his income is connected, absorb the chief portion of his time and attention, and therefore his strictly clerical work or duty will fall within the statutory limitation of "occasional." His appeal for exemption upon his residence will therefore be also disallowed.

But what is the position of clerical treasurers of church funds? I cannot, I think, upon principle, distinguish their position from that occupied by the managers of the business institutions connected with the religious bodies. They are sitting in the counting-house, dealing with the funds, their investment and distribution, and though clothed in full canonicals, the clerical side of their work and duty can, I think, with all fairness, be only viewed as "occasional." The appeals, therefore, of the Rev. Wm. Reid and Rev. James Grey will be dismissed.

I lastly approach, with considerable doubt, the last division of these appeals—that of superannuated ministers. Where they are entirely unconnected with any lay employment, their small superannuation allowance will, in most instances, escape the tax collector's claim, by being within the \$400 exemption applicable to all citizens. I am quite clear in their case that any excess of income which they may fortunately possess beyond \$400, unless the same is derived from clerical employment or church funds, will not be exempt, because the words of the statute are, "stipend or salary." But the question of their right to the \$2,000 exemption for dwelling-house is less free from doubt. It is quite true that the clerical work and duty they do, in one view, may be said to be only occasional; yet it is the only work or duty they perform. They are still in actual connection with the church, and any duty they perform is done as such clergymen. They have no ordinary business or calling that is not clerical. If the Legislature had the intention to deal gently with the clerical order, and to free them from some of the burdens imposed upon the ordinary citizen, one cannot but think that these veteran soldiers of the church, worn out in the service, the vast majority of them decayed in body and estate, were amongst the most fit objects of its bounty. Though I am bound to construe the legislative language with strictness, yet I shall not, I think, be deemed reprehensible if, in the case of this deserving class of claimants, I am not astute in finding reasons for depriving them of what, in their case, will indeed be a benefaction. I shall therefore allow the appeals for exemption for residence of the Rev. Messrs. C. Campbell, W. Cleland, John Hunt and Samuel Rose. There remains

only one appeal undisposed of which presents some curious features. It is that of Rev. J. D. Gilbert, who states that he has charge of a poor congregation in an outlying township of an adjoining county; that he preaches to them every fortnight; and they are so poor that they barely raise enough to pay the expense of his fortnightly journey to them to perform service. He lives in Toronto, and does no other than clerical work. The exemption claimed by him is in respect to his residence, assessed at \$600. No assessable income is returned. Modern science has so bridged over distance that it may well happen that a clergyman may live in one county and perform clerical duty in another. I can see no reason why this appeal should not be allowed. Though at first sight it does appear somewhat incongruous that one municipality should practically provide a dwelling-house for a minister whose charge lies in another, I can find nothing in the Assessment Act which prevents this claim from being successfully set up under the law. The appeal will therefore be allowed.

I cannot conclude this judgment without expressing the hope that at its next session the Legislature will see fit to re-cast the clause of the Act of 1885 which I have had under consideration, and by the use of clearer and more explicit language free the construction of the section from any reasonable doubt. If, as was urged before me, it desires to grant the exemption to those clergymen only who are in actual charge of congregations, let it say so in plain and unambiguous language. The conflicting decisions pronounced in different counties upon the clause in question warrants me in expressing the hope that all doubts will be set at rest by some clearer expression of the Legislative will.



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LAW SOCIETY.

**SUPREME COURT OF CANADA.**

ADAMSON (Defendant), Appellant v.  
ADAMSON (Plaintiff), Respondent.

*Statute of limitations—Conveyances to trustees—  
In trust for tenant for life—Remainder to joint-  
tenants or tenants in common—possession by tenant  
of tenant for life.*

Appeal from the Court of Appeal for Ontario.

By a deed to trustees in 1837, two lots of land were conveyed in trust for E. A. for her life, with remainder as follows:—Lot No. 2 to G. A. and lot No. 1 to A. A., to the use of them, their heirs and assigns as joint-tenants, and not as tenants in common. E. A., the tenant for life, entered into possession of lot No. 2, and in 1863 put her son, the husband of the defendant, into possession without exacting any rent. The son died a few months after, and the defendant, his widow, continued in possession of the lot, and was in possession in 1875, when the tenant for life died.

In 1878, A. A., the plaintiff, obtained a deed of the legal estate in the two lots from the executors of the surviving trustee (G. A. having died a number of years before), and brought an action against the defendant for the recovery of the said lot No. 2.

*Held*, that as there was no time prior to the death of the tenant for life, when either the trustee or the remainder-man could have interfered with the possession of the said lot, the statute of limitations did not begin to run against the remainder-man until the death of the tenant for life in 1875, and he was therefore entitled to recover.

*Held*, also, that for the purposes of the said action it was immaterial whether the plaintiff was entitled to the whole lot by survivorship on the termination of the joint-tenancy by the

death of his brother, or only to his portion of the lot as one of his brother's heirs.

Appeal dismissed with costs.

C. Robinson, Q.C., for appellants.

Mowat, Attorney General, and MacLennan, Q.C., for respondents.

FAULDS ET AL. (Plaintiffs), Appellants v.  
HARPER (Defendant), Respondent.

*Mortgagor and mortgagee—Foreclosure and sale—  
Purchase by mortgagee—Right to redeem after  
—Statute of limitations—Trustee for sale.*

Appeal from the Court of Appeal for Ontario.

In a foreclosure suit against the heirs of a deceased mortgagor who were all infants, a decree was made ordering a sale: the lands were sold pursuant to the decree and purchased by J. H., acting for and in collusion with the mortgagee; J. H., immediately after receiving his deed, conveyed to the mortgagee, who thereupon took possession of the lands, and thenceforth dealt with them as the absolute owner thereof; by subsequent devises and conveyances the lands became vested in the defendant M. H., who sold them to the defendant L., a *bona fide* purchaser without notice, taking a mortgage for the purchase money. In a suit to redeem the said lands, brought by the heirs of the mortgagor, some eighteen years after the sale, and more than five years after some of the heirs had become of age.

*Held*, reversing the judgment of the Court of Appeal, that the suit being one impeaching a purchase by a trustee for sale, the statute of limitations had no application, and that, as the defendants and those under whom they claimed had never been in possession in the character of mortgagees, the plaintiffs were not barred by the provisions of R. S. O. cap. 108, sec. 19, and that the plaintiffs were consequently entitled to a lien upon the mortgage for purchase money given by L.

*Held*, also, that as it appeared that the plaintiffs were not aware of the fraudulent character of the sale until just before commencing their suit, they could not be said to acquiesce in the possession of the defendants.

Appeal allowed with costs.

McCarthy, Q.C., for appellant.

Street, Q.C., for respondent.

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PETRIE (Plaintiff), Appellant, v. GUELPH  
LUMBER Co., ET AL.

INGLIS ET AL. V. SAME.

STEWART V. SAME.

*Corporation—Promoters of—Action against company and promoters for fraudulent misrepresentation—Action ex delicto for deceit—Fraudulent concealment.*

Appeal from the Court of Appeal for Ontario.

A suit was brought against a joint stock company, and against four of the shareholders who had been the promoters of the company. The bill alleged that the defendants, other than the company, had been carrying on the lumber business as partners and had become embarrassed; that they then concocted a scheme of forming a joint stock company: that the sole object of the proposed company was to relieve the members of the firm from personal liability for debts incurred in the said business, and induce the public to advance money to carry on the business: that application was made to the Government of Ontario for a charter, and at the same time a prospectus was issued which was set out in full in the bill: that such prospectus contained the following paragraphs among others, which the plaintiff alleged to be false:

1. The timber limits of the company, inclusive of the recent purchase, consist of 222½ square miles, or 142,400 acres, and are estimated to yield 200 million feet of lumber.

2. The interest of the proprietors of the old company in its assets, estimated at about \$140,000 over liabilities, has been transferred to the new company at \$105,000, all taken in paid up stock, and the whole of the proceeds of the preferential stock will be used for the purposes of the new company.

3. Preference stock not to exceed \$75,000 will be issued by the company to guarantee eight per cent. yearly thereon, to the year 1880, and over that amount, the net profits will be divided amongst all the shareholders *pro rata*.

4. Should the holders of preference stock so desire, the company binds itself to take that stock back during the year 1880 at par, with eight per cent. per annum, on receiving six months' notice in writing.

5. Even with present low prices the company, owing to their superior facilities, will be able to pay a handsome dividend on the ordinary, as well as on the preference stock, and when the lumber market improves, as it must soon do, the profits will be correspondingly increased.

The bill further alleged that the plaintiffs subscribed for stock in the company on the faith of the statements in the prospectus: that the assets of the old company were not transferred to the new in the condition that they were in at the time of issuing the prospectus: that the embarrassed condition of the old company was not made known to the persons taking stock in the new company, nor was the fact of a mortgage on the assets of the old company having been given to the Ontario Bank, after the prospectus was issued, but before the stock certificates were granted: that the assets of the old company were not worth \$140,000, or any sum over liabilities, but were worthless; and prayed for a rescission of the contract for taking stock, for repayment of the amount of such stock, and for damages against the directors and promoters for misrepresentation.

There was evidence to show that the promoters had reason to believe the prospects of the new company to be good, and that they had honestly valued their assets.

On the argument, three grounds of relief were put forward:

1. Rescission of the contract to subscribe for preference stock.

2. Specific performance of the contract to take back the preference stock during the year 1880 at par.

3. Damages against the directors and promoters for misrepresentation. The company having become insolvent, the plaintiffs put their case principally on the third ground.

*Held*, affirming the judgment of the Court below, 11 Ont. App. R. 336, that the plaintiffs could claim no relief against the company by way of rescission of the contract, because it appeared that they had acted as shareholders, and affirmed their contracts as owners of shares, after becoming aware of the grounds of misrepresentation.

*Held*, also, as to the action against the defendants other than the company for deceit, that the evidence failed to establish such a

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case of fraudulent misrepresentation as to entitle plaintiffs to succeed as for deceit.

*Held*, also, as to the alleged concealment of the mortgage to the Ontario Bank, it having been given after the prospectus was issued it could not have been in the prospectus, and moreover that the shareholders were in no way damnified thereby, as the new company would have been equally liable for the debt, if the mortgage had not been given; and as to the concealment of the embarrassed condition of the old company, the evidence showed that the old firm did not believe themselves to be insolvent; and in neither case were they liable in an action of this kind.

Appeal dismissed, with costs.

*McCarthy*, Q.C., for appellants.

*Robinson*, Q.C., and *Cassels*, Q.C., for respondents. -

#### COURT OF APPEAL.

From C. P. Div.]

[February 10.

DYMENT v. THOMPSON.

*Sale of goods—Place of inspection—Acceptance of part—Cross-action for damages.*

The judgment of the Court below, 9 Ont. R. 566, was upheld.

*Lount*, Q.C., and *Kappele*, for the appellants.

*McCarthy*, Q.C., and *Pepler*, for the respondents.

From C. C. Renfrew.]

[February 10, 1886.

DAVIS v. CANADIAN PACIFIC RAILWAY CO.

*Consolidated Railway Act, 1879—Railway Act, 1868—"Occupied land"—"Proprietor"—Company's duty to fence—Free Grant and Homestead Act—Neglect to fulfil settlement duties, effect of—Partial answer of jury to written question—Contributory negligence.*

The plaintiff and one N. were occupants of adjoining lots of land, the plaintiff residing upon lot 11, and N. being in possession of lot 10, and by agreement between them, the plaintiff was permitted by N. to pasture one of plaintiff's horses on N.'s lot. The horse strayed from N.'s lot, which was unfenced, upon the

defendants' track, and was killed by a passing train, whereupon the plaintiff sued the defendants for damages.

N. had been located for lot 10 in 1882, by the Crown Land Agent at Pembroke, and N.'s name had been entered upon the agent's book opposite the lot, and upon receipt of the affidavit required by the Act, 43 Vict. cap. 4, sec. 1, amending sec. 7 of the Free Grant and Homestead Act, R. S. O. cap. 24, the agent duly returned him to the department as being located therefor. No license of occupation was issued, and nothing more was done beyond filing the return in the department. About twenty acres of N.'s lot were cleared and in pasture, and from a portion hay had been mowed for several seasons. N. had been working on the lot thirteen years, although the settlement duties required by the Act as regards putting up a house, actual residence, etc., had not been fulfilled. It was in evidence that the department did not usually take advantage of a forfeiture by non-performance of settlement duties, unless another party applied for the lot. No such application was here shown, but the defendants argued that N. was not an "occupant," in whose interest they were required to fence. The plaintiff resided in lot 11, adjoining N.'s lot, but he only occupied, without title, a small portion of it, remote from the railway.

At the trial, a question was submitted by the learned judge to the jury, in the following terms:—"Was Nadeau, mentioned in the evidence, the occupant of lot 10 in Range A, on the 11th August, 1884, or of any part of it; and did the horse sued for escape from such occupation?" And the answer rendered by the jury was:—"We unanimously agree that he is the occupant of the whole lot." After verdict for the plaintiff, the defendants obtained an order for a new trial upon the ground that the jury had omitted to answer fully one of the questions submitted to them. It appeared from the evidence that there was ample testimony to prove that the animal escaped from N.'s lot, and could not possibly, owing to a deep rock cutting, have escaped from the plaintiff's lot; and that there was no conflict of evidence on the point, nor any suggestion by counsel at the trial that the defendants disputed it; nor was any objection taken at the trial to the form of the answer; and

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that all parties had tacitly agreed to dispense with a formal finding. Furthermore, the frame of other questions submitted to the jury, and their answers, assumed the fact. The learned judge granted an order for a new trial, on the ground that the facts not being formally and distinctly found by the jury, the verdict could not be supported. On appeal to this Court,

*Held*, that by the words, "occupied land," under 46 Vict. cap. 24, is intended to be denoted land adjoining the railway, and either actually occupied up to the railway line, or constructively occupied by reason of the actual occupation of some part of the section, lot, or smaller tract by the person who owns it, or is entitled to the possession of the whole; and that while mere occupation as that of a squatter, apart from a right to occupy, is not contemplated by the statute, N. was here in a position to require the company to fence.

*Held*, also, that N., as locatee of the lot, was properly an occupant and proprietor under the statute, notwithstanding his failure to fulfil his settlement duties, as this failure did not *ipso facto* divest him of his interest in the land, in the absence of action by the Crown to dispossess him by cancellation of the location.

*Held*, also that a new trial was unnecessary, and that the plaintiff was entitled to his verdict; and that, under the circumstances, the question of contributory negligence could not properly arise.

*Aylesworth*, for the appellants.

*Hector Cameron*, Q.C., and *R. White*, for the respondents.

From Proudfoot, J.]

[February 25.]

### DORLAND V. JONES.

*Religious body—Grant for the benefit of—Change in faith and discipline—Confirmation deed—Right of settlor to add new condition.*

The judgment of PROUDFOOT, J., 7 Ont. R. 17, 4 C. L. J. 195, was reversed.

*S. H. Blake*, Q.C., and *Clute*, for the appellants.

*MacLennan*, Q.C., and *Arnoldi*, for the respondents.

### CHANCERY DIVISION.

Divisional Court.]

[March 6.]

#### DAWSON V. MOFFATT.

*Creditors Relief Act of 1880—Execution creditors—Stop orders—Priorities—Rateable distribution.*

Since the coming into force of the "Creditors Relief Act of 1880," March 25th, 1884, execution creditors who obtain stop orders on funds in Court do not obtain any priority thereby; but all must share rateably. As some of the provisions of the statute are to enable simple contract creditors to come in and obtain the position of execution creditors they must have the same right with regard to funds in Court as they would have with regard to funds in the sheriff's hands; and in any case when an execution creditor obtains a stop order there will have to be a reference to the Master to ascertain if any other creditors desire to ask a share of the fund.

*J. H. Ferguson*, for the appeal.

*Arnoldi*, *Shepley* and *Ruttan*, for other creditors contra.

Boyd, C.]

[March 23.]

#### MUNSIE V. LINDSAY.

*Occupation rent—Allowance for improvements—Mode of taking account—Will—Construction—Charge on interest of remainderman after decease of devisee for life.*

Appeal from the Master's report.

In fixing the amount of occupation rent to be paid by a person who had been in occupation of land under mistake of title, and also the amount to be allowed to him in respect of improvements made upon the land, the Master in Ordinary charged occupation rent on the unimproved value, and allowed no interest on the value of the improvements.

One of the grounds for the present appeal was because the Master should have estimated the rental on the full improved value.

*Held*, that apart from the statute R. S. O. ch. 95, sec. 4, when lasting improvements were the subject of compensation, whether in favour of a mortgagee, or a part owner, or a stranger, the rule was to make him account for profits of the whole property improved. The said

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statute, though it limits the lien for improvements to the amount of enhanced value at the date of action, does not interfere with the manner of accounting as to the occupation rent, having regard to the improvements. That remains to be settled, so that equitable restitution may, as far as possible, be awarded on each side. When the possessor makes lasting improvements, and thereby increases the occupation rent, and the owner seeks to charge him with this rent, he should do equity by allowing interest on the cost or value, as the case may be, at that time. The claim for the full rent of the improved land, and the counterclaim for interest on the outlay, appear to be reciprocal and entitled to equal respect. Assuming that the outlay is greater than the rental, and that the rental is more than the interest, the strictly correct way to take the account, in view of expenditure from time to time, would be thus: at the end of the first year ascertain the fair rent based on the improved value, and apply this to reduce the actual cost of proper outlay for lasting repairs and improvements, with interest from the date of doing or paying for the work. The balance will represent the amount of principal expended, which is to bear interest for the next year. Add any other expenditure in that year, and so carry on the account to the end. Then, in order to satisfy the statute, ascertain how much principal money has been paid from time to time by the overplus of the rent, and so find how much has been paid in respect of the enhanced value of which a lien is given. If the total of these repayments of principal equals the amount of the enhanced value, the lien has been fully satisfied; if not, there should be a lien for the difference. If, in the aggregate, the lien has been overpaid yet, so long as the cost of improvement has not been fully recouped, it cannot be said that the result is any hardship to the real owner, who need not have invoked this manner of accounting.

By a certain will the testator bequeathed to his wife his farm during her natural life. He then said: "I give and bequeath to my son Adam his board and lodging, with £5 per year during his natural life, to be given as herein-after mentioned. I give and bequeath to my son Alexander (certain other land) under the following restrictions: . . . to pay to Adam

£3 currency each and every year during Adam's natural life. I give and bequeath to my son Robert (the said farm) after his mother's death, on the following conditions, that is to say: £2 in each and every year to be paid by him to Adam (my son), and to keep him (my son, Adam) in board and lodging during his natural life."

*Held* (affirming the decision of the Master in Ordinary) that the will meant that Robert was to supply maintenance continuously after the testator's death as a condition of enjoying the land, and not only after the death of his mother, and such maintenance formed a charge upon the land left to Robert.

It is not, as a general thing, the best rule in cases of varying opinion as to value, to reject one set of witnesses *in toto*, and to adopt the figures of an opposing set. One should rather conclude that neither is exactly to be followed, and that the truth lies somewhere between the extremes.

*W. Cassels, Q.C., and R. Cassels, for the appellants.*

*C. Moss, Q.C., and Barwick, contra.*

#### PRACTICE.

Mr. Dalton, Q.C.]

[April 12.]

CARNEGIE V. COX ET AL.

*Examination of witnesses before trial—Discovery—Rule 285, O. J. A.*

The defendants asserted as a counter claim in this action a claim against the plaintiff, which they had bought from the assignee for creditors of F. & L., stockbrokers, who were not parties to the suit. This claim was the balance of an account for carrying stock for the plaintiff. The plaintiff swore that he believed that F. & L. had dealt improperly with the stock that they were carrying for him, but that he had no means of discovering what they did with it, unless by examining them.

Under these circumstances an order was made under Rule 285, O. J. A., for the examination of F. & L., for the purpose of discovery only.

*J. R. Roaf, for the plaintiff.*

*H. Cassels, for the defendants.*

Prac.]

NOTES OF CANADIAN CASES.

[CONC.]

Mr. Dalton, Q.C.]

[April 27.]

## PRETTIE V. LINDNER ET AL.

*Serving papers—Toronto agents—Disclosing principal.*

Service of papers on a Toronto agent for solicitors in the country is not good unless accompanied with a statement of the name of the solicitors for whom the agents are served.

MacGregor, for plaintiff.

Holman, for defendants.

Mr. Dalton, Q. C.]

[April 29.]

## RE RAINY LAKE LUMBER CO.

*Security for costs—Action on behalf of others—Financial incompetency of plaintiff.*

One S., a contributory of the company, petitioning to set aside a winding-up order, was required to give security for the costs of the company and a creditor opposing the petition, where it appeared that S., although he had a nominal interest as the holder of stock upon which nothing was paid, was not in such a position that anything could be made out of him upon execution, and was petitioning merely in the interest of other persons who lived out of the jurisdiction, and who had indemnified S. as to costs.

J. R. Roaf, for the company.

Worrell, for the petitioning creditor.

J. B. Clarke, for S.

Wilson, C.J.]

[April 29.]

## RE FOLEY V. MORAN.

*Division Court—Jurisdiction—Setting aside judgment—Time—Rule 270, O. J. A.*

The Judge of a Division Court has no jurisdiction to set aside a judgment after the expiry of fourteen days from the trial.

Although the defendant has fourteen days to move against a verdict in the Division Court it is proper for the plaintiff to enter judgment and issue execution before the expiry of the fourteen days.

The practice under Rule 270, O. J. A., is not applicable to Division Courts.

Kappele, for the plaintiff.

A. D. Kean, for the defendant.

## COUNTY COURT CASES.

## COUNTY COURT, COUNTY OF ONTARIO.

## FOLEY V. MORAN ET AL.

*Transcript from Division Court—Wrongful return of "nulla bona"—No return against one defendant—Rule 113—New trial.*

[Whitby—Dartnell, J.J.]

This was a motion to set aside a judgment founded upon a transcript to the County Court of the County of Ontario, from the 6th Division Court of the same County.

The suit was originally brought in the Division Court upon a joint note, made by Patrick and James Moran. Patrick was not served, it being now stated that he was out of the country. James filed a dispute note, but, not appearing at the hearing, judgment was entered against him by default, there being no evidence taken. No application was made to strike out the name of the defendant Patrick under Rule 113. Execution was issued against James Moran alone, and the bailiff returned "nulla bona." Thereupon a transcript from the Division to the County Court was filed, and writs against lands and goods of James Moran were placed in the hands of the sheriff, who seized goods to the value of \$400 or \$500.

DARTNELL, J.J., set aside the judgment in the County Court on the ground that the transcript did not show a return against both defendants, one of them not having been served and his name not struck out under Rule 113.

Held also, that an alleged wrongful return of "nulla bona" in the Inferior Court is not of itself ground for setting aside the County Court judgment.

Held also, that where, at the hearing, the defendant not appearing, judgment was entered by the Judge; that there was no adjudication on the merits, and the judgment could be set aside notwithstanding fourteen days had elapsed.

N. F. Paterson, Q.C., for plaintiff.

A. W. Kean, for defendant.

## REVIEWS.

## ONTARIO BANK V. MADILL ET AL.

*Transcript—Irregularity apparent on its face—  
Setting same aside.*

[Whitby—Dartnell, J.J.]

When on the face of a transcript there appeared to be two defendants, but only one was served, and judgment was entered against one, and "*nulla bona*" returned as against one, the judgment was set aside.

## REVIEWS.

THE CANADIAN FRANCHISE ACT, with Notes of Decisions on the Imperial Acts relating to Registration, and on the Provincial Franchise and Election Acts, with an Appendix containing the Franchises of the several Provinces of the Dominion, by Thomas Hodgins, M.A., Q.C., editor of Hodgins's Election Cases, Manual of Voters' Lists, etc. Toronto: Rowsell & Hutcherson, Law Publishers, 1886.

This, Mr. Hodgins's last work, is the best of his many valuable contributions to Canadian legal literature. It gives a full summary of the law affecting all classes of cases relating to the Electoral Franchise likely to arise under the Canadian Act of 1885.

As claimed by the author in his preface, the annotations seem to embody all the leading cases which have been decided under analogous statutes in England and the various Provinces. To these are added references to the decisions of the American Courts which illustrate the English or Canadian cases. To show the industry and research of the author, it may be stated that nearly nine hundred authorities have been cited, and not, as is too often the case, simply interjected at the foot of a section in a haphazard manner, but, judging from specimens we have examined, evidently carefully read and considered, and the marrow of the case extracted and appropriately placed.

The history of the Franchise is a very interesting one. It is referred to in the book before us in an able resumé, and is illustrated by a table of the statutes affecting this branch of the law, commencing with the Imperial Act of 28 Edward I., which shows the course of legislation from that time to the present. But for the recognized imperfection of all human thought and expression, and the constantly changing phases of life and circumstances, one would suppose that perfection would by this time have been reached.

In the earlier part of the book we find elaborate notes on what is meant by "owner," and "in right of his wife." To the learning in the latter may now be added a reference to the Act of the last session of the Local Legislature of this Province, and to the judgment of the Master in Chambers in *Reg. ex rel. Felitz v. Howland* (not yet reported), which, by the way, would have been more valuable if it had discussed the two main points taken on the argument in favour of the defendant's qualification, viz.: the decision of Chief Justice Richards in the *Prescott case*, Ho. E. C. 1, and the effect of this decision when the same words are used in a subsequent statute. It is a pity that this case was not appealed, and so remove doubts and settle the law. In subsequent parts of the work, and, in fact, all through it, are to be found other notes of much value, showing that the author has fully and intelligently considered and mastered the subject he writes upon.

The work is free from the too common fault, not to say literary fraud, of "padding," and is an honest and successful attempt to throw light upon a statute which has received great attention on the part of the public, and is likely to come often before the profession and the Bench. For convenience of form and size, as well as in typographical execution, the volume is all that can be desired.

CANADIAN FRANCHISE AND ELECTION LAWS. A Manual for the use of Revising Officers, Municipal Officers, Candidates' Agents, and Electors. By C. O. Ermatinger, Q.C., etc. Toronto: Carswell & Co., Publishers, 1886.

This volume is divided into two parts. Part I., which contains the Franchise Laws of the Dominion and of the several Provinces in full, and treats of the same subject as the one noticed above. Part II., gives chapters on some points of election law, corrupt practices, agency, penalties, conduct of the election, ballot papers, and persons who may not be elected, nor sit and vote. The annotations in Part I. are confined almost exclusively to the Dominion Statute.

Mr. Ermatinger's book was published promptly after the passing of the recent statute, and in this respect was of service to many who took advantage of the information given; but though such promptness has its advantages, it does not always pay in the end, especially when competing against a book published by one so thoroughly versed in this branch of the law as the present Master in Chancery. But, at the same time, Mr. Ermatinger has done his work well, and his book will be a valuable addition to the literature on the subjects treated of, and be useful to all who are concerned

## REVIEWS—SUMMARY PROCEEDINGS BEFORE JUSTICES.

in the administration of the Franchise Acts and the Election Law. It treats of more subjects than the manual of Mr. Hodgins, but is not so full in its treatment of the Franchise Act.

It was alleged by a writer in the daily press that the author had copied, without credit being given, some notes from Mr. Hodgins's Manual of Voters' Lists. We are quite sure that if such be the case it must have been a slip on Mr. Ermatinger's part. We offer no opinion on the subject, but would merely refer to a few of the several passages complained of, as follows:—

Voters' Lists Manual.	Ermatinger's Fran. Act.	Some Complaints.
p. 89 .....	p. 10 .....	Printer's errors reproduced in cases cited.
p. 20, note (g) .....	p. 90 .....	Note taken, copying also error in date which should be 6th, not 7th July.
p. 10 .....	p. 89 .....	Reproduction of clerical error — 7 Ves. 174; correct reference is 7 Ves. 265.
p. 10 .....	p. 89 .....	Reference to <i>Galloway v. Ward</i> 1 Ves. 318, an error in Manual (there being no such case reported), but error reproduced by Mr. E.
p. 100 .....	p. 107 .....	Reproduction of mistake in citing <i>Rex v. Mitchell</i> , as from 8 East 511; should be 10 East.

Some of the coincidences above cited, and others on pp. 16, 22, 23, 43, 100, etc., of the volume before us, as compared with corresponding notes or citations on pp. 111, 92, 5, 99, 107, etc., in the Voters' Lists Manual, are perplexing; but Mr. Ermatinger has publicly denied the charge of copying from the previous work. In his letter he says:

"I hardly think Mr. Hodgins claims the copyright of all the authorities cited in his manual. He must do so, were he to complain of any one citing the same cases. They are mingled with other cases obtained from all available sources. It would be as reasonable to charge plagiarism in respect of every case cited, because the digest in which it was found is not duly credited therewith. I would be the last to decry the merits or usefulness of Mr. Hodgins's little work, now out of print, and, owing to changes in the law, somewhat out of date. It contains a valuable digest of many of the older authorities. I was under the impression that it was in the list of authorities given in my book, until 'Scrutator's' letter drew my attention to its absence, which, I suppose, is due to the fact that Mr. Hodgins's opinions are not cited; while the similarity of the subjects dealt with in a portion of my book with those treated in his necessitated many of the same authorities being cited in both volumes. . . . As to whether Galloway should be spelled with an 'o' or three 'a's,' Groseenny with one or two 'n's,' or Burgis with an 'e,' or whether Mr. Hodgins, or his printer, or I, or my printer, were originally responsible for these trifling errors, are not, I think, questions of sufficient moment to call for discussion."

## SUMMARY PROCEEDINGS BEFORE JUSTICES.

Hon. Mr. Gowan has introduced in the Senate a Bill in relation to this matter which has passed its second reading. In moving it the learned Judge says:—

"A similar Bill to the one before you was submitted last session and met the approval of this hon. House in the form in which it is now presented. It was very fully debated at the time, but I may be pardoned if I briefly remind hon. gentlemen of its leading features and the principle upon which it is based. It proposes to deal with one branch of the Criminal Law—that in relation to Summary Jurisdiction—by giving the Judges of the Superior Courts in the several Provinces ample powers to prevent a failure of justice in cases where guilt is established, but technical exactness is not found in the history, so to speak, of what has passed before the Court of first instance. In a word, to confer upon these judges the like full powers they are now invested with in regard to more serious offences as well as in civil cases.

The authority to hear and determine summarily in respect to offences of a minor character has, of necessity, been delegated to convenient tribunals accessible to all, and is now very extensive, embracing a multitude of subjects, and is exercised by a very numerous class—the Justices of the Peace throughout the Dominion.

Their decisions are subject to review—first, upon the ordinary appeal to the Court of General Sessions of the Peace; second, upon the appeal to the Judges of the Superior Courts before whom the proceedings may be brought by writ of *certiorari*; the former, the appeal to the Sessions, is not a matter of common right, but must be given by express enactment—the latter is not a qualified right, like the appeal to the Sessions, but lies of course, as a matter of common law, unless expressly taken away by statute.

The general enactment respecting appeals to the Sessions is found in the Acts of 1869, cap. 31, sec. 65, and secs. 67 and 68 enable a decision on the merits notwithstanding some defect in the form of the conviction or order; and if the person charged or complained against is found guilty the conviction or order shall be affirmed, and the Court shall amend the same if necessary, and any conviction or order so affirmed or affirmed and amended shall be enforced in the manner provided by law.

Thus local tribunals have very full power to prevent a failure of justice upon appeal lodged before them, but the Judges of the Superior Courts have no such powers in respect to summary convictions,



## SUMMARY PROCEEDINGS BEFORE JUSTICES—CORRESPONDENCE.

but are compelled to deal with the subject in a strictly technical way.

It is different when a case comes before them from an inferior court of record. Everything is presumed in favour of the regularity of the proceedings of a Court of Record, the presumption is the other way in respect to proceedings before Justices of the Peace, and the only mode in which their proceedings can be reviewed by the Superior Courts is when brought up on a writ of *certiorari*.

Also in matters of civil concern the Judges of the Superior Courts have power to amend an error or defect, and give judgment according to the very right and justice of the case.

Moreover, in indictable offences the Dominion Procedure Act of 1869 makes full provision for curing defects in form.

Thus the anomaly exists that the Court of Sessions, an inferior Court, has larger powers for preventing a miscarriage of justice in this particular than have the Judges of the Superior Courts. That while not merely in civil cases but in the graver criminal cases—indictable offences—these judges are properly invested with extensive power to guard against a miscarriage of justice, such powers are denied them when they come to pass upon cases of summary conviction, cases where the power is more necessary, because the original proceeding is not before regularly trained men. Hon. gentlemen will see in this an evil, and the object of this Bill is to bring this branch of administration more into harmony with modern ideas, here and at home, which aim at securing substantial justice, notwithstanding purely technical objections not touching the very merits of a case. Every member of the legal profession who hears me will know that the defective power in respect to summary conviction, when under review by the judge upon *certiorari*, is not over stated." The speaker then referred to several cases, to give some idea to others of the extreme exactness in form required under the law as it exists, and how the judges are crippled and handicapped, in their desire to prevent miscarriage of justice—to prevent the law being set at naught. And then read extracts he had received from some leading jurists approving of the measure before the House.

## CORRESPONDENCE.

## UNPROFESSIONAL ADVERTISEMENTS.

To the Editor of the LAW JOURNAL:

DEAR SIR,—I send you an advertisement from a newspaper published in this city, as follows:—"Will be sold by public auction, on the premises, in the city of St. Thomas, on Tuesday, the 6th April, at 3.30 p.m., the stock of Moore, Munn & Co., consisting of dry goods, clothing, gents' furnishings, as per inventory, amounting to \$7,295.15. This is a new and good stock. Premises can be had. Terms  $\frac{1}{2}$  down; balance, 2, 4 and 6 months, secured, interest 7 per cent. Stock list on premises, and with ———, Vendors' Solicitors, London."

This advertisement, "displayed" after the usual manner of advertisements, gives one rather a rude shock when the names of a large legal firm appear at its foot. Some people seem to get used to this kind of thing, and it does not seem to occur to this enterprising firm that there is anything in bad taste in this way of doing business.

Yours, etc.,  
SOLICITOR.

## ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

- What is a voluntary appearance in a foreign Court.—*Law Journal* (London), Jan. 9.  
Divulging a client's name.—*Ib.*  
The disposing power of married women.—*Ib.*, Jan. 16.  
Appropriation of payments.—*Central L. J.*, Dec. 4., 1885.  
Rights of a person suffering an injury when violating the Sunday law.—*Ib.*, Dec. 18.  
Litus of personal property for taxation.—*Ib.*, Jan. 1.  
Some points ruled in telephone law.—*Ib.*, Jan. 8.  
The doctrine of "account stated."—*Ib.*, Jan. 22.  
Verdicts in civil cases. Their form and substance.—*Ib.*, Jan. 29.  
Profert of the person in criminal cases.—*Criminal Law Magazine*, Nov., 1885.  
Competency as witnesses of attorneys, judges, jurors and prosecutors.—*Ib.*  
Habeas corpus in controversies touching the custody of children.—*Ib.*, Jan., 1886.

## ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS—FLOTSAM AND JETSAM.

Liquor laws.—*Ib.*, February.  
 Conviction of one crime under an indictment for another.—*Ib.*  
 The legal profession in England. Its history, its members and their status.—*American Law Review*, Sept., Oct., 1885.  
 Insurance law. Expert evidence as to increase of risk.—*Ib.*  
 Railway delinquencies.—*Ib.*  
 Title to dividends as between life tenants and remaindermen.—*Ib.*  
 Definition of a lien.—*Ib.*  
 Contracts of insurance as affected by changes of title.—*Ib.*, Nov., Dec.  
 Codification. Its defects and advantages discussed.—*Ib.*, Jan., Feb., 1886.  
 Survival of actions.—*Ib.*  
 Civil liability of physicians and surgeons.—*Ib.*  
 Garnishment. (What establishes liability—Who are liable—Indemnity—Answer—Defences—Priorities—Evidence.)—*American Law Register*, Oct., 1885.  
 The power of an administrator with the will annexed over his testator's real estate.—*Ib.*, Nov., 1885.  
 Injury to minor child by collision while a voluntary passenger in vehicle driven by her father. Contributory negligence of father.—*Ib.*  
 Assignment of life insurance policies. General principles affecting—Title of the assignee—Rights of the assignor—Insurable interests as applied to assignees.—*Ib.*, Dec., 1885.  
 Citizenship in the United States.—*Ib.*, Jan., 1886.  
 Legislation impairing the obligation of contracts.—*Ib.*, Feb.  
 Testamentary provisions as affected by the rules of private international law.—*Ib.*, March.  
 Insurable interest in life.—*Albany L. J.*, Nov. 14, 21, 1885.  
 The law of sidewalks.—*Ib.*, Nov. 28.  
 Report of the committee of the New York Bar Association on the delay and uncertainty in judicial administration.—*Ib.*, Jan. 30, 1886.  
 Right of husband to sue wife for breach of nuptial contract.—*Irish L. T.*, Jan. 16.  
 Inspection of ballot papers.—*Ib.*, Jan. 2.  
 Jan-keeper's servants.—*Ib.*, Feb. 20.  
 Real estate brokers. Their right to commission.—*Central L. J.*, Feb. 5 (will be re-published hereafter).  
 Negotiable notes secured by mortgage. Right of assignees by endorsement or delivery.—*Ib.*  
 Municipal and quasi-municipal contracts.—*Ib.*, Feb. 12.  
 Fence law.—*Ib.*, Feb. 26.

Right of set-off as against holder of a note endorsed to him after maturity.—*Ib.*, Feb. 19.  
 Names of persons—Various points in reference to.—*Ib.*, Mar. 5.  
 Delay in presentment of claims against decedents estates.—*Ib.*  
 Risks attending the purchase of certificates of stock.—*Ib.*, Mar. 19.  
 Evidence of intent.—*Ib.*  
 Sunday observance.—*Albany L. J.*, Feb. 6.  
 Survival and abatement of actions.—*Ib.*, Feb. 27, Mar. 13.  
 The Law Courts under the Judicature Acts.—*Law Quarterly Review*.  
 The transfer of land.—*Ib.*, Jan.  
 A difficulty in the law of consideration.—*Ib.*  
 Duties of insuring safety. Risk to others. The rule in *Rylands v. Fletcher*.—*Ib.*  
 Mistakes of law again.—*Ib.*

## FLOTSAM AND JETSAM.

A PINCH OF SALT.—Some time ago a lawyer in Boston was trying a case against a street railway company, and there was an old sailor on the jury who seemed to give no heed. The lawyer made his most eloquent appeals, but all in vain. Finally he stopped in front of the sailor and said: "Mr. Jurymen, I will tell you just how it happened. The plaintiff was in command of the outward-bound open car, and stood in her starboard channels. Along came the inward-bound close car, and just as their bows met she jumped the track, sheered to port, and knocked the plaintiff off and ran over him." The old sailor was all attention after this version of the affair, and joined in a \$5,000 verdict for the injured man.—*Washington Law Reporter*.

WHOSE IS THE PRESCRIPTION.—The Supreme Court of Massachusetts, in a decision on the question as to who owns the prescription, has ruled as follows: "The question before the court seems to be very simple indeed. A patient applies to a physician and receives from him certain advice

## FLOTSAM AND JETSAM.

for which he tenders a fee. The physician hands a piece of paper to the patient, purporting to be a written order for certain goods, called drugs, which order is filled by a merchant or apothecary. The payment of the fee and the delivery of the goods or drugs terminates the verbal contract, and the druggist keeps the prescription as evidence that the contract has been fulfilled as far as he is concerned. The druggist can, if he so please, on his own responsibility, renew the drugs, for he is but a merchant, and has a perfect right to sell drugs to any one and in any shape. He need not keep the prescription, nor is he bound to give a copy, but, should error occur, he has no protection in case of suit. From this it would appear that a prescription is but an order for drugs, and the delivery of the drugs settles the matter."—*Washington Law Reporter*.

BOTH the new Lord Chancellor and the new Attorney-General are men who have worked their way to the top through the dust and heat of the profession. Sir Farrar Herschell's father was at the end of his days the incumbent of a proprietary chapel at Kilburn, having passed through several stages of religious doubt, and finally become a clergyman of the Church of England. His son, until he rapidly came to the front on the Northern Circuit, was a contributor to the law newspapers. Mr. Russell began his professional life as a solicitor in Belfast, where he was the partner of the well-known Mr. John Rea, whose extraordinary talents were extinguished by an excitable temper and eccentric habits, and who put an end to his life in 1881. The idea always prevailed in Ireland that Mr. John Rea was a far abler man than his partner. Mr. John Morley, the new Chief Secretary for Ireland, was called to the Bar two years after his colleague on the woolsack, but did not practise. Mr. Arnold Morley, the new "Whip," has been at the Bar twelve years, and went the Midland Circuit. Many Chancellors of the Exchequer have been lawyers before Sir William Harcourt, including Mr. Lowe, Mr. Spencer Perceval, and Mr. William Pitt. Perceval, like the New Chancellor of the Exchequer, had been a law-officer. Mr. Childers breaks the practice which has prevailed of late years of having a lawyer at the Home Office.—*Ex.*

A LAW STUDENT WHO OUGHT TO BE A LAWYER.—I fell across an amusing story the other day in Madame Adam's interesting book, *La Patrie Hongroise*. Hungary, says Madame Adam, swarms with barristers. It is the ambition of the Hun-

garian peasant to make one of his sons an advocate, as it is the ambition of the Breton and the Irish peasant to make one son a priest. The son of a small farmer in the neighbourhood of Pesth was sent by his father to the law school of the town, but either from want of parts or application, was plucked in the qualifying examination. Not daring to return home empty handed, after all the money that had been spent on his education, he forged a legal diploma. The father, however, was not so ignorant as not to be aware that such diplomas are always written on parchment *Kutya-ber*—"dog-skin" in Hungarian. "Why is your certificate not made out on *Kutya-ber*?" asked the old man. "The fact is, father," answered the youth, "that there are more barristers than dogs in Hungary, and so there is not enough *Kutya-ber* to make diplomas for us all."—*London Life*.

LITTELL'S LIVING AGE.—The numbers of the *Living Age* for April 10th and 17th contain "The Relations of History and Geography," by James Bryce, and Newman & Arnold, *Contemporary*; "About Kensington Gore, and the Rosettis," *Fortnightly*; "In French Prisons," by Prince Kropotkin, *Nineteenth Century*; "Ireland under her own Parliament," *National Review*; "Musings without Method," *Blackwood*; "A Pilgrimage to Sinai," *Leisure Hour*; "Reminiscences of my Later Life," by Mary Howitt, *Good Words*; "Jewish Folk-Medicine," *Spectator*; "Lying as a Fine Art," *Saturday Review*; "Dutch Skating Grounds," *St. James's Gazette*; "Queen Victoria's Keys," *Chambers*; "Of the Writing of Letters," *All the Year Round*; "Indian Death Customs," *Knowledge*; with instalments of "Ambrose Malet," "The Haunted Jungle," and "The Light at the Farmhouse," and Poetry.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price (\$8) is low; while for \$10.50 the publishers offer to send any one of the American \$4.00 monthlies or weeklies with the *Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

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# Canada Law Journal.

VOL. XXII.

MAY 15, 1886.

No. 10.

## DIARY FOR MAY.

- 16. Sun....3rd Sunday after Easter.
- 17. Mon....Easter sittings of Divl. Ct., Q. B., and C. P. begin.
- 21. Fri....Confederation proclaimed 1867. Lord Chancellor Lyndhurst born 1772.
- 23. Sun....4th Sunday after Easter.
- 24. Mon....Queen Victoria born 1819.
- 27. Thur....Habeas Corpus Act passed 1679. Sir W. Grant Master of the Rolls, 1801.
- 30. Sun....Rogation Sunday.
- 31. Mon....Parliament first met at Toronto, 1797.

TORONTO, MAY 15, 1886.

THE judgment in the County Court case of *Foley v. Moran*, noted in our last number (*ante*, p. 167), is not in all respects to be followed. On application for prohibition, Wilson, C. J., is said to have decided that although the defendant did not appear at the hearing there was an adjudication on the merits, and that the application not having been made within fourteen days could not be set aside.

## ACTIONS FOR TORTS BY AND AGAINST THE REPRESENTATIVES OF DECEASED PERSONS.

AMONG the amendments of the law made at the recent session of the Ontario Legislature is one relating to actions of tort, which, besides making a further inroad on the old maxim, *actio personalis moritur cum persona*, will, we think, hereafter occasion considerable difficulty and delay in administering the estates of deceased persons.

Perhaps there was a want of equity in the old rule which deprived the representatives of a deceased person of all remedy for wrongs committed against the deceased in his lifetime, and by the death of the

wrong-doer exempted his estate from liability for the wrongs done by him in his lifetime. This rule, however, was relaxed, and for injuries committed to the real estate of any person, committed within six months next before his decease, a right of action was given to his representatives provided they sued within one year after his death. So also in the case of any wrong committed by any deceased person within six months previous to his decease, to the real or personal property of another, his representatives were made liable to suit, provided the action was commenced within six months after they had taken upon themselves the administration of his estate. (R. S. O. c. 107, ss. 8, 9.) These provisions, however, have been repealed, and now by 49 Vict. c. 16, s. 23, the personal representatives may maintain an action for all torts or injuries to the personal property of the deceased (slander and libel only excepted), provided the action is brought within one year after the death of the party injured; and it is further provided that "in case any deceased person committed a wrong to another in respect of his person, or of his real or personal property, the person so wronged may maintain an action against the executors or administrators of the person who committed the wrong. This section does not apply to libel or slander." This clause, we may observe, gives a new right of action against the personal representatives of a deceased person, unqualified by any limitation of time within which the action is to be brought. This, we think, is a serious omission, and personal representatives may in consequence of it be placed in a serious quandary in administering estates. Suppose a personal representative is notified of a claim for a tort

## THE FUTURE DEVOLUTION OF REAL ESTATE.

against the deceased, and the claimant refuses or neglects to bring a suit to recover his claim, the personal representative will be unable to distribute the estate for an indefinite period, and will have no means of obtaining an adjudication upon the alleged claim.

It is true that there is a period of limitation for actions of tort, so far as the action is against the tort-feasor, but it may be a question whether it has any application to actions against the representatives of a deceased tort-feasor. The statute, it may be argued, has constituted an entirely new cause of action, and has placed no limit on the time within which it may be prosecuted. This appears to us to be a serious blunder.

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**THE FUTURE DEVOLUTION OF REAL ESTATE.**

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Nor the least remarkable Act passed by the Ontario Legislature at its recent session is that respecting the estates of deceased persons. By this Act a most important change has been effected in the law of real estate—in fact, one of its distinguishing features may be said to have been almost swept away.

Hitherto one of the chief characteristics of real estate was the mode in which the fee simple descended to the heirs-at-law. It was this peculiarity which constituted the great difference between the fee simple and what were called chattel interests in land. But this point of distinction is now to a great extent abolished by the Act in question. It, however, still survives as regards estates tail.

On and after the 1st July next all estates in fee simple, or estates *pur autre vie* limited to the heir as special occupant, in any tenements corporeal or incorporeal within Ontario and whether devised by will or not, will, upon the death of the

owner, instead of descending to his heirs-at-law or passing to his devisees direct under his will, devolve upon and become vested in his executors or administrators, and be subject to the payment of his debts, and so far as such property is not disposed of by will, it is thereafter to be distributed as personal property. The widow's right of dower however is not taken away unless she elects to take under the Act; and the husband of a deceased owner may, by deed executed within six calendar months after his wife's death, elect to take his curtesy in lieu of the share he would take under the Act.

Upon this Act coming into force, therefore, the realty as well as the personalty of a deceased person will, in the first place, vest in his personal representatives, who will have full power to administer both classes of property, and upon the debts of the deceased being duly paid, it will be the duty of the personal representative to convey such parts of the realty as have been devised, and are not required for the payment of debts, to the devisee, whose title, instead of coming direct under the will as heretofore, will henceforth come through the personal representative. Such part of the realty as may remain after payment of the debts of the deceased owner, and as to which he shall have died intestate, will be distributed among the next of kin of the deceased in the same manner as the undisposed of personalty.

It will thus be seen that "the heir-at-law" is practically disinherited. Like Othello, his occupation is gone. He will no longer succeed directly or indirectly to the estate of his ancestor. The personal representative and the next of kin have supplanted him. The statute known as the Real Estate Succession Act is virtually repealed.

It will certainly seem rather anomalous to continue to convey land to a man and his heirs, when his heirs can by no possibility any longer have any right to

## THE FUTURE DEVOLUTION OF REAL ESTATE—SELECTIONS.

inherit it, and yet we presume a conveyance of land to a man and "his executors and administrators" would now, as formerly, convey but a life estate for want of proper words of limitation, notwithstanding the provisions of section 4 of the Conveyancing and Law of Property Act, 1886.

An English real property lawyer, without the heir-at-law to conjure with, is very like an actor attempting to produce the play of Hamlet without the melancholy Dane. Possibly it may be held that the legal personal representatives of a deceased person are by the Act now constituted his legal "heirs-at-law," for the purpose of inheriting his estates of inheritance.

No doubt the Act will be found to have produced other apparent incongruities, and it may be somewhat difficult to make it fit in with all the old learning on the law of real estate. But notwithstanding any technical difficulties that may arise, we think the Act will prove to be a move in the right direction, and though it is perhaps not framed in the best mode that could have been devised for simplifying this branch of the law, it will nevertheless remove what has for a long time been felt to be an anomaly, viz., the inability of the personal representative to administer what is often the principal part of a deceased person's assets.

For the protection of those beneficially entitled certain safeguards are provided. An administrator will be required to give security for the value of the land as well as the personal property; and where infants are interested in land, which, but for the Act, would not devolve on the personal representative, the latter cannot sell without the concurrence of the official guardian *ad litem*, or an order of the High Court of Justice. The High Court has power to appoint a local judge or a local Master to concur instead of the official guardian.

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It is impossible to agree with the summing-up of Mr. Justice Cave in *Regina v. Hyndman* as reported in the daily papers. The questions for the jury in a prosecution for seditious words, as in a case of defamatory words or writings, are—first, were the words charged spoken? and, secondly, had they the tendency alleged? The learned judge's summing-up was, however, concerned almost entirely with the question of malice, an inference which the law presumes against the utterer of words with a seditious tendency. The only reference to the presumption of law upon which the whole case turned seems to have been in the words: "The Attorney-General had said that inciting to disorder was the natural consequence of the words the defendants used, and, therefore, they were responsible for it. He could not agree entirely as to that. There must be, in order to make out the offence of speaking seditious words, a criminal intent. The words must be seditious and spoken with a seditious intent. Although it was a good working rule to say that a man must be taken to intend the natural consequences of his acts, it was very proper to ask the jury if there was anything to show to the contrary." In some reports Mr. Justice Cave is made to say of this fundamental rule of law that it is a legal fiction, but it is difficult to believe that this was meant to be conveyed. The learned judge appears to have relied too much on clause 102 of the Criminal Code (Indictable Offences) Bill, which in an endeavour to be brief is altogether obscure. Mr. Justice Stephen, however, in his "Digest of the Criminal Law," modifies that statement by adding "in determining whether the intention with which any words were spoken was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself." This is a clumsy periphrasis, but that Mr. Justice Stephen meant to draw no distinction between sedition and defamation in this

## SELECTIONS.

respect is clear, because he refers as authorities to *Regina v. Burdett*, 4 B. & A. 95, and *Regina v. Harvey*, 2 B. & C. 257, both cases of libel. It is unfortunate that the case was not begun by information, or removed into the Queen's Bench, so that on a motion for a new trial the true state of the law might be declared.—*Law Journal* (London).

### CODIFICATION.

OURS has been so long the solitary "voice of one crying in the wilderness" in favour of codification, so far as legal journalism is interested, that it is really a comfort to discover that we have an alert and efficient coadjutor at last in the *American Law Review*, the most influential and able publication of its class in America. Our readers who do not agree with us on this subject—and they are numerous—will perhaps have a little more patience with us when they read the following from the *Review*:—"The blind and stupid opposition which the movement in favour of the codification of the law is encountering in the United States, is not a particle above the opposition which the movement in favour of abolishing law French and conducting legal proceedings in English, encountered in the legal profession in England more than two hundred years ago. The question is this, and only this: Shall that portion of the law which is settled, and that which is capable of being definitely and precisely stated, be written and authoritatively published in one book, or shall it be scattered, as now, through several thousand books? A majority, and we are ashamed to say a very large majority, of the New York city Bar Association, at a recent meeting answered this question in the negative. The influence of the legal profession upon public opinion, and the respect which the public entertain for that profession, have been for several years steadily declining. When a body composed of the most cultivated members of that profession will, by a majority which amounts almost to unanimity, vote down a resolution to the effect that the law ought, as far as possible, to be reduced to the form of a statute, it must be said that the poor opinion which the

public entertain of the legal profession is fully justified. Enlightened laymen see that no reform in the law is practicable except that it be put on foot, and directed by the members of that profession who alone are learned in the law. They also see that a large portion—a majority, as it appears so far, of that profession—are opposed to what thinking laymen must regard as a most urgent and needy reform, and they draw from this the inference that the real reason why so many lawyers oppose such a reform is that the lawyers are interested in keeping the law in such a state of intricacy, confusion, perplexity and mystery, that whenever a business man wants to know what the law is on any point he must go to a lawyer with a large fee. In our judgment this opinion of laymen is in part justified by the facts. In other words, while we believe and fully concede that a good deal of the opposition to codification springs from learned and honest visionaries who believe that it would have the effect of checking what they are pleased to term the natural growth of the law, another portion of it is real dishonesty, having a foundation in no higher motive than the desire of lawyers to keep the law in a state of confusion and mystery, and thereby increase legal business and enhance legal fees." Now, Messrs. Carter, Dwight and J. Bleeker Millar to the rescue! Here's another heretic to be burned! And really he seems a more "offensive partisan" than ourselves. And as Rip Van Winkle says in the play, "now he'll catch it."—*Albany L. J.*

### EVERY PRISONER HIS OWN WITNESS.

THE legislation which for years past has reformed the law of evidence, has, in our opinion, in one respect at least, overstepped the mark. To confer upon a prisoner, tried for a felony, the privilege of testifying on his own behalf is to bestow upon him a boon of very doubtful value, and it may well be questioned whether the practice tends to the furtherance of justice or the development of truth. The law which authorizes a prisoner to testify upon his trial places him under a moral duress compelling him to do so, under the pen-

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alty, if he declines, of the most damaging suspicion on the part of the jury, as well as of the public. It is true that the law may say, and the judge may charge, that the jury must not infer from his silence anything to the disadvantage of the prisoner; but the jury will act under the law of human nature which is in this respect a higher law than the law of the land. They will think, and say to each other, that if he was not guilty he would have sworn to his innocence, and there is no law so stringent, and no judge so august as to prevent them from so thinking and so saying. If to avoid this horn of the dilemma, he chooses to encounter the other, and enter the witness box it avails him very little, his testimony is at best, of but little value, generally absolutely worthless, for the jury, still acting under the higher law of common sense, will say that if he is guilty of crime of which he is accused he will not hesitate to add perjury to it. In any event his deliverance must come *aliunde*.

Besides this the average defendant in criminal cases is "unaccustomed to public speaking," and by no means in the habit of arranging his ideas in logical sequence, or expressing them in apt terms. Under the literally and metaphorically, "trying" circumstances of a trial for a felony, it would not be remarkable that he should "should lose his head" and say things that could easily be construed into a confession of guilt. That sort of thing has often happened. Many a man has tied a rope around his neck with his tongue. Flustered and frightened, agitated by the novel circumstances under which he is placed, awed by the solemnity of the proceeding, and anxious beyond measure as to the grave consequences of an error, it is not remarkable that in every point of view he does himself much more harm than good, and, whether innocent or guilty, gives testimony the direct tendency of which is to convict, not to acquit him. He is in a position almost identical with that of the wretches of olden times to whom the wisdom of the law denied the aid of counsel, and who, whether old or young, learned or ignorant, male or female, were obliged to defend their lives by their own eloquence.

The truth is, there are but two words which a person, accused of serious crime,

should, if he is well advised, say upon the subject, from the hour of his arrest to the rendition of the verdict, and those two words are "not guilty."

All this is *apropos* of a recent case in Nevada (*State v. Maynard*, S. C., Nev. Feb. 8, 1886; West Coast Reporter, p. 248) in which a defendant charged with larceny essayed to testify in his own behalf, and made a mess of it. He was convicted, but luckily for him, the judge of the trial court had misdirected the jury, that: "The actions of the defendant are a safer foundation from which to draw a conclusion as to his intention at the time of the alleged taking than any subsequent declarations in his own favour." This, the Supreme Court held to be error, that the jury should have been instructed that they must draw their conclusions, as to the guilt or innocence of the prisoner, from the whole testimony taken together, his own as well as that of other persons. The Supreme Court further held, that the trial court could not instruct the jury as to the relative weight of different classes of testimony, and that, "such a charge is a decision upon a question of fact."

In commenting on the case of *Regina v. Jarrett*, one of the malodorous *Pall Mall Gazette* cases, the *Law Journal* of London points out another anomaly created by this line of legislation. It says: "One fact can clearly be gained from the first trial on an extended scale in which prisoners have given evidence on their own behalf, namely, that criminal trials will be much longer in the future. A most important question remains as yet undealt with, namely: Ought a prosecution for perjury to follow the trial of a case in which a prisoner has given evidence which is untrue? If, in the present state of the law, such a prosecution should take place, a curious result would follow. On the trial for perjury the same facts would be in issue as at the trial under the Criminal Law Amendment Act, but the prisoner could not give evidence. His evidence in the witness-box on the previous occasion would be good evidence against him, but not in his favour; and he cannot give fresh evidence, because the change does not yet apply to perjury. This result is one of the evils of piecemeal legislation.

The *Law Journal* thinks that further legislation on the subject is called for. Our



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own opinion is that the proper course is to retrace the steps taken in that direction, and hereafter to proceed *super antiquas vias*.—*Central Law Journal*.

### NOTES OF CASES IN UNITED STATES COURTS.

In *Gibbs v. Coykendall*, 39 Hun. 141, the plaintiff hired the defendant to pasture cattle on his farm, and they there fell sick and died of Texan fever, which they contracted from the dejections of Texan cattle previously pastured there. The plaintiff did not know of the previous pasturing, and the defendant did not know of this danger of contracting the disease.

*Held*, that the defendant was not liable. The Court, Haight, J., said: "Counsel for the plaintiff requested the court to charge the jury 'that if the jury believed that Texan cattle had been pastured in the lot, and that Texan fever could be communicated to native cattle pasturing in the lot where Texan cattle had been pastured, that the plaintiff's cattle died of Texan fever communicated to them from the noxious emanations of the Texan cattle pastured before they went into the pasture, then the plaintiff was entitled to recover; that the defendant was bound to furnish a healthy and safe pasture, so far as poisonous substances in the field were concerned.' Plaintiff's counsel also requested the court to charge 'that the effect of the introduction of Texan cattle was a matter of public notoriety; that it had been known since 1868, and had been the subject of public discussion; that commissioners had been appointed by the United States government to investigate it, and that the defendant was bound to know of the effect of pasturing Texan cattle where native cattle were to be pastured from the publicity that had been given to it, and that it was his duty to notify the plaintiff that Texan cattle had been pastured on the lot when the bargain for pasturing was made.' Both of these requests were refused, and the exceptions taken on such refusal present the only questions which we are called upon to determine this appeal. The questions thus presented are somewhat novel, and yet we think they may be properly disposed of upon

well recognized principles. An agister of cattle is a bailee for hire, and as such is bound to use ordinary diligence properly to care for and protect the cattle placed in his charge, and is responsible for loss occasioned by his negligence. He is bound to furnish a pasture secure against the ordinary accidents incident to the cattle to be pastured. The field must be properly fenced, and be free from dangerous places or obstacles. A failure in these respects will render him liable for damages occasioned thereby. But he is not an insurer of the property, and unless he is guilty of negligence he would not be liable for injuries that may be suffered through other causes, and over which he has no control. He is bound to use ordinary care, that care which an ordinarily prudent person would exercise over his own property of like character. . . . *Clafin v. Meyer*, 75 N. Y. 260; S. C., 31 Am. Rep. 467. Again, it is claimed that he ought to have known of the deleterious influence that such cattle would create. It is true that like trouble had been occasioned in several of the western States, and to some extent in this State, that it had been the subject of investigation by the government, and in some of the States laws had been passed prohibiting the pasturing of Texan cattle. But the liability of native cattle to contract the disease from Texan cattle was but little known or understood in this State. It was not a matter of such public notoriety among our farmers as would justify the court in charging, as a matter of law, that the defendant was bound to have known it. We are consequently of the opinion that the court did not err in refusing to charge as requested."

In *Boyle v. New York, etc., R. Co.*, 39 Hun. 171, it was held that as to cattle trespassing on a railroad track, the engineer, having sounded the whistle to alarm them, is not bound to reduce the speed of the train, and the company is not liable. The court, Baker, J., said:—"The defendant was under no legal obligation to reduce the speed of the train, and there is no evidence that the speed was accelerated after the engineer knew that the horses were on the tracks. The defendant was engaged in operating its road in the usual

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and customary way, as it had a clear and lawful right to do. The defendant had the unqualified right to use its property in any way and manner it was pleased to do, up to the point of doing an intentional injury to the property of another. There was no obstacle to prevent the horses escaping from the tracks to a place of safety any moment, and at any time after they were discovered by the engineer up to the instant they were struck and killed on the bridge. The usual and ordinary means adopted to drive cattle from the tracks is the noise of the train and the sounding of the whistle or bell, and such signals are generally sufficient for that purpose without checking the speed of the train. *Bemis v. Conn. R. Co.*, 42 Vt. 381; S. C., 1 Am. Rep. 339. We are not aware of any rule of law that requires a railroad company to do more with a view of avoiding injury to cattle trespassing upon its tracks. It is impossible to conjecture why the engineer should have purposely and maliciously done this injury to the plaintiff's property. The evidence was not sufficient to sustain the conclusion reached by the jury that the engineer acted wantonly and maliciously, and the question should not have been submitted to their consideration. The most that can be said in criticising his action is that his conduct was heedless and morally wrong. *Nicholson v. Erie R. Co.*, 41 N. Y. 525. The precise question has been passed upon in the courts of other States, and the same conclusions were reached on a state of facts similar to those before us. *Maynard v. Boston and Maine R. Co.*, 115 Mass. 458; S. C., 15 Am. Rep. 119; *Darling v. Boston and Albany R. Co.*, 121 Mass. 118. The jury should have been instructed to render a verdict for the defendant. *McCanless v. C. and N.-W. R. Co.*, 45 Wis. 365; *Price v. New Jersey, R. & T. R. Co.*, 31 N. J. L. 230; *Indianapolis P. & C. R. Co. v. Candle*, 60 Ind. 112." *Chic. & Alton R. Co. v. Kellam*, 92 Ill. 245; S. C., 34 Am. Rep. 128, seems to the contrary. See also *Cincinnati, etc., R. Co. v. Smith*, 22 Ohio St. 227; S. C., 10 Am. Rep. 729, and note, 732.

In *Matter of Gould & Co., West. Pub. Co., and Lawyers' Co-Op. Pub. Co.*, the Supreme Court of Connecticut have held that the State having a contract with a

publishing house for the publication of volumes 49 to 54 of the reports of its Supreme Court of Errors, and provided that a copyright of each volume should be taken out in the name of the secretary of the State, for the benefit of the State, the official reporter will not be compelled, by order of the court, to deliver to any applicant who offers to pay the legal fees copies of the judicial decisions of the court, when the same are desired for publication before the publication thereof in the official reports, or the advance sheets thereof. The court said: "For the information of the public the State of Connecticut publishes reports of cases argued and determined in the Supreme Court of Errors. The volume is prepared for publication by the official reporter, and contains the opinions written by the judges, together with head-notes to all cases, foot-notes to some of them, statements of facts, a table of cases, and an index to subjects, the work of the reporter. The judges and the reporter are paid by the State, and the product of their mental labour is the property of the State, and the State, as it might lawfully do, has taken to itself the copyright. The statute requires the comptroller to supervise the publication of the volumes, taking a copyright for the benefit of the State. Under this, that officer for a valuable consideration granted to Banks & Bros., who agree to print and sell the reports at a fixed price, the protection of the copyright for a limited period. During three or four years the State, with knowledge, has acquiesced in the terms of this contract, and accepted the resulting benefits. If therefore we should now direct the reporter to furnish copies of opinions to the petitioners, that they may sell them to the public in advance for their own profit, we should in effect advise the State to a breach of contract. It is for the State to say when and in what manner it will publish these volumes, and the taking of the copyright in no sense offends the rule that judicial proceedings shall be public. The courts and their records are open to all. The reasons given by the Supreme Court of Errors for its determination in a given cause constitute no part of the record therein. The judgment stands independently of these. Moreover, these are accessible to all who desire to use them in the enforcement of their rights."—*Albany Law Journal*.

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**PUBLISHING A JUDGE'S JUDGMENT.**

On February 26th, before Baron Huddleston and a special jury, the case of *M'Dougall v. Knight* was tried. The case raised the question whether the publication of a judgment by one of the parties to an action can be made the foundation of an action for libel. In the year 1884 an action was tried in the Chancery Division between the present plaintiff, a gentleman residing at Battlefields, near Bath, and the present defendants, a firm of auctioneers in Bath. In delivering judgment in this action, Mr. Justice North made certain observations upon the behaviour of Mr. M'Dougall during the trial, and expressed certain conclusions unfavourable to that gentleman's conduct in the course of the transactions in question. This judgment was subsequently printed and circulated in pamphlet form by the defendants, with a preface in which, after stating that the reports in the local papers were fragmentary, the defendants said they offered to their friends "a *verbatim* report of the very able judgment of Mr. Justice North, which contains an impartial statement of facts with the facts deducible from them, and really gives all the information necessary to be known." This pamphlet contained the libels complained of in the present action, the passages relied on in the statement of claim being the passages of Mr. Justice North's judgment above referred to. At the beginning of the case Baron Huddleston asked how the plaintiff could succeed, this being an action for the publication of a judgment in which a learned judge delivered certain findings after five days' trial. It was contended that by their preface the defendants made the words their own. It was further submitted that a publication was only privileged when it was a fair report of the whole proceedings, not of the judgment merely. Moreover, it was proposed to show express malice, in which case there would be no privilege. The cases of *Lewis v. Levy*, 27 Law J. Rep. Q. B. 287; *E. B. & E.* 537; *Millisich v. Lloyd*, 46 Law J. Rep. C. P. 404; and *Stevens v. Sampson*, 49 Law J. Rep. Q. B. 120; *L. R.* 5 Exch. Div. 53, were cited. Mr. Alexander William M'Dougall, the plaintiff, gave evidence as to what had occurred

at the trial before Mr. Justice North, his evidence being directed to showing that the judgment did not give a fair and accurate report of the proceedings. He stated that the only evidence given on the points above referred to, on which Mr. Justice North had found against him, was that of himself and his wife, their evidence being opposed to the finding, and that no charges of the kind made by his lordship had been laid by the counsel for the defendants. The plaintiff also said that after the judgment he saw Mr. Knight and told him that he intended to appeal, though the judgment was substantially in his favour. (Evidence as to what subsequently passed in the Court of Appeal was excluded by his lordship.) In cross-examination at a later stage of the case, Mr. M'Dougall said that the report as published was not a fair or accurate report of what Mr. Justice North had said, and pointed to passages in support of this, particularly passages where the learned judge had read evidence from his notes, which the report did not profess to reproduce, only the beginning and end of such passages being given, and the hiatus marked by the words, "&c., &c." The plaintiff said that evidence favourable to himself was omitted in some of these passages, but failed to point to any other place in which evidence in his favour was not noticed in the judgment. Mrs. M'Dougall gave corroborative evidence on these points.

On objection that there was no case to answer, it was contended that, apart from the question of privilege, there was evidence that the report was not accurate, and it rested with the defendants to prove that it was, and that there was evidence of express malice—first, in the publication of the report for his own ends by a party to the action, as distinguished from a newspaper reporter or other disinterested party; secondly, in the publication after notice of an intended appeal; and, thirdly, in the failure to withdraw or apologize after the Court of Appeal had negatived Mr. Justice North's finding on these points. Baron Huddleston, having stated that he should take the opinion of the jury on the issues raised by the pleadings, called the shorthand writer, who stated that the report as published was a *verbatim* report of the judgment, except as to a few

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minor words and the passages where the learned judge read from his notes, where it was impossible for a shorthand writer to follow him. Baron Huddleston, in terms of the defence, asked the jury to say—(1) whether the pamphlet was a fair, accurate, and honest report of the judgment of Mr. Justice North; (2) whether it was published by the defendants *bona fide*, and with the intention of making known the true facts of the case for the protection of their own interests; (3) whether there was malice on the part of the defendants. The jury at once answered the first two questions in the affirmative and the third in the negative, and judgment was given for the defendants accordingly, the learned judge refusing to stay execution.—*The Irish Law Times*.

## NOTES OF CANADIAN CASES.

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LAW SOCIETY.

## SUPREME COURT OF CANADA.

### BEATTY V. THE NORTH-WEST TRANSPORTATION CO.

*Corporation—Sale by director to company—Ratification of by-law by shareholders—Vote of owner of property.*

A director of a joint stock company personally owned a vessel which he wished to sell to the company; he was possessed of a majority of the shares of the company, some of which he assigned to other persons in such numbers as qualified them for the position of directors, which position they accordingly filled. Upon a proposed sale and purchase by the company of the said vessel, the board of directors, including the owner of the vessel, passed a by-law approving of such purchase by the company; and, subsequently, at a general meet-

ing of the shareholders, at which the said owner and those to whom he had transferred the portions of his stock were present and voted, a resolution was passed confirming the said by-law, which resolution was opposed by a number of the shareholders representing nearly one-half of the total stock of the company.

*Held*, reversing the decision of the Court of Appeal, 11 Ont. App. R. 205, that the board of directors had no power to pass the said by-law, and under the circumstances the resolution of the shareholders confirming the by-law was invalid.

Appeal allowed with costs.

*Mowat*, Atty.-Gen., and *MacLennan*, Q.C., for appellants.

*Robinson*, Q.C., and *McDonald*, Q.C., for respondents.

STARRS (Defendant), Appellant, AND COSGRAVE BREWING AND MALTING COMPANY (Plaintiffs) Respondents.

*Suretyship—Contract of with the firm—Continuing security to firm and member or members constituting firm for the time being—Death of partner—Liability of surety after.*

Appeal from the Court of Appeal for Ontario.

S., by indenture under seal, became surety to the firm of C. & Sons for goods to be sold to one Q.; and agreed to be a continuing security to the said firm, or "to the member or members for the time being constituting the said firm of C. & Sons," for sales to be made by the said firm or "any member or members of the said firm of C. & Sons" to the said Q., so long as they should mutually deal together.

P. C., the senior member of the said firm, having died, and by his will appointed his sons, the other members of the firm, his executors, the latter entered into a new agreement of co-partnership, and continued to carry on the business under the same firm name of C. & Sons, and subsequently transferred all their interest in the said business to a joint stock company.

An action having been brought against S. for goods sold to Q. after the death of the said P. C.

*Held*, reversing the judgment of the Court of Appeal, 11 Ont. App. R. 156, and restoring

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the judgment of the Common Pleas Division, 5 O. R. 189, that the death of P. C. dissolved the said firm of C. & Sons, and put an end to the contract of suretyship.

Appeal allowed with costs.

*MacLennan, Q.C., and O'Gara, Q.C., for appellant.*

*Osler, Q.C., for respondents.*

### GRAND TRUNK RAILWAY COMPANY v. BOULANGER.

*Accident—Loss of Life at ferry wharf—Company  
—Liability of—Damages.*

Appeal from Quebec.

L. B. brought an action of damages against the G. T. R. Co. for the loss of her husband, L. H. F., who was drowned on the night of the 6th of November, 1883, by falling off the pontoon in the River St. Lawrence at the wharf owned by the company in the city of Quebec, when he was going to cross over to Levis by the company's ferry between Levis and Quebec, on his way to take the cars at Levis, and alleged her husband's death had been caused by the default and negligence resulting from his own imprudence and of the company's in not having put rails, guards and gates, and lights sufficient to ensure the safety of passengers. The company contended there was sufficient light, and that they were not bound to have guards or gates. At the trial there was evidence that this was a dangerous place, being a dark narrow passage leading down to the ferry; that two lights were usually lighted, and that only one was lit on the night of the accident. That after the accident two were lighted and a chain placed across the end of the passage, so as to prevent persons falling off the pontoon when the ferry was not at its moorings. The Superior Court found there was sufficient light, and dismissed the plaintiff's action on the ground that the death of the respondent's husband resulted solely from his own imprudence, negligence and want of care.

The Court of Appeal reversed the judgment of the Superior Court, and awarded \$1,000 damages to the plaintiff. On appeal to the Supreme Court of Canada,

*Held*, that the evidence showed culpable

negligence on the part of the railway company in not having sufficient lights, and in not having a gate or chain to guard against accidents.

That damages should not be increased, but interest should be allowed by the Court of Queen's Bench from the date of the demand.

BEATTY (Defendant), Appellant, AND OILLE  
ET AL. (Plaintiffs), Respondents.

*New trial—Verdict for plaintiff—Technical breach  
of contract—Defendant entitled to nominal dam-  
ages for.*

Appeal from the Court of Appeal for Ontario.

In an action to recover the balance of the contract price for work done for the defendant, the declaration also containing the common count for work and labour, the evidence showed that there was a technical breach of the contract, by which, however, the defendant had sustained no substantial damage. A verdict was found for the plaintiff, and a rule for a new trial was refused by the Divisional Court and also by the Court of Appeal.

*Held*, affirming the decision of the Court of Appeal, that a verdict would not be set aside merely to enter a verdict for the other party for nominal damages.

Appeal dismissed with costs.

*S. H. Blake, Q.C., and McDonald, Q.C., for appellants.*

*Osler, Q.C., and Cox, for respondents.*

ONTARIO AND QUEBEC RAILWAY COMPANY  
(Appellants), AND PHILBRICK (Respond-  
ent).

*Railway company—Lands taken for railway pur-  
poses—Arbitration—Award—Matters consid-  
ered by arbitrators—Costs.*

Appeal from the Court of Appeal for Ontario.

A railway company, having taken certain lands for the purposes of their railway, made an offer to the owner in payment of the same, which offer was not accepted and the matter was referred to arbitration under the Con. Railway Act, 1879. On the day that the arbitrators met the company executed an agreement for a crossing over the said land in addition to the money payment, and it appeared

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that the arbitrators took the matter of the crossing into consideration in making their award. The amount of the award was less than the sum offered by the company, and both parties claimed to be entitled to the costs of the arbitration, the company because the award was less than their offer, and the owner because the value of the crossing was included in the sum awarded, which would make it greater than the offer.

*Held*, affirming the judgment of the Court of Appeal (GWYNNE, J., dissenting), that under the circumstances neither party was entitled to costs.

Appeal dismissed with costs.

*Blackstock*, for appellant.

*McMichael*, Q.C., for respondent.

HOBBS ET AL. (Plaintiffs), Appellants, AND  
NORTHERN ASSURANCE COMPANY (De-  
fendants), Respondents.

SAME (Plaintiffs) Appellants, AND GUARD-  
IAN FIRE AND LIFE ASSURANCE COM-  
PANY (Defendants), Respondents.

*Fire Insurance—Condition in policy—Loss by  
explosion—Loss by fire caused by explosion—  
Exemption from liability.*

Appeal from the Court of Appeal for Ontario.

A policy of insurance against fire contained a condition that "the company will make good loss caused by the explosion of coal gas in a building not forming part of gas works, and loss by fire caused by any other explosion or by lightning."

A loss occurred by the dropping of a match into a keg of gunpowder on the premises insured, the damage being partly occasioned by the explosion of the gunpowder, and partly by the gunpowder setting fire to the stock insured. The company admitted their liability for the damage caused by fire, but not for that caused by the explosion.

*Held*, reversing the decision of the Court of Appeal, 11 Ont. App. R. 741, TASCHEREAU, J., *advisante*, that the company were not exempt by the condition in the policy from liability for damage caused by the explosion.

Appeal allowed with costs.

*Gibbons*, for the appellants.

*Marsh*, for the respondents.

## CHANCERY DIVISION.

Boyd, C.]

[January 20.

RE TRENT VALLEY CANAL.

RE WATER STREET AND THE ROAD TO  
THE WHARF.

*Public works—Expropriation—Compensation—  
Ownership of roads—Soil vested in Crown—  
Parties.*

Certain lands on which were two roads called "Water Street" and "The Road to the Wharf," being required for public works, were expropriated by the Dominion Government, and the compensation therefor was claimed by the corporation of the village in which the roads were and by one R. C. S., through or over whose lands the roads ran. It appeared that roads were established as public highways by the municipal authorities by by-law in the years 1842 and 1845 respectively, under 4 & 5 Vict. c. 10, ss. 39 & 51, although no compensation was paid to the owners therefor.

*Held*, that although originally the soil and freehold of the roads or streets may have remained in the private owner subject to the public easement (the right of user) since the year 1858 at all events it became vested in the Crown by virtue of 22 Vict. c. 99, s. 301, and that the Attorney-General of Ontario should be added as a party to give protection to the Dominion in expropriating the land.

The Master's findings were therefore overruled.

*McCarthy*, Q.C., and *Barron*, for R. C. Smith.

*G. T. Blackstock*, and *Moore*, for the corporation of Fenelon Falls.

*C. Robinson*, Q.C., and *Nelson*, for the Dominion Government.

*McMichael*, and *Creelman*, for mortgagees.

Proudfoot, J.]

[March 6.

IN RE MELVILLE.

*Sale subject to a condition—Breach of condition—  
Will—Devise—Possibility—R. S. O. c. 106, s. 2  
Right of entry for condition broken—Valid con-  
dition of re-entry—Heirs-at-law—Devise.*

On Sept. 26, 1844, J. LeB. by deed bargained and sold, etc., to the municipal council of D. District, in consideration of five shillings, a

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certain lot for the purpose of erecting thereon a schoolhouse for the use of D. District, to have and to hold the same for the purpose aforesaid unto the municipal council forever. The deed was subject to a proviso that the said council should, within one year from its date, erect a schoolhouse for the use of the said District; or if the said council should at any time erect any other building save said schoolhouse and necessary offices, or should sell, lease, alien, transfer, or convey the said land, it should be lawful for the said J. LeB. and his heirs to re-enter and avoid the estate of the said municipal council.

J. LeB., by his will dated July 23rd, 1847, devised all his real estate to certain nieces, and died in the year 1848 without having revoked or altered said will. The municipal council complied with the condition by building a school-house, and at the time of the making of the will the condition had not been broken, but the successors of D. District dealt with the land otherwise than was authorized by the deed and broke the condition. The land having been sold, a petition was filed to have it declared whether the devisees under the will of J. LeB. or his heirs-at-law were entitled to the proceeds thereof.

*Held*, that the word "possibility" in R.S.O. c. 106, s. 2, includes a right of entry for condition broken mentioned in sec. 10, and is more extensive than that phrase, and might, therefore, be a subject of a devise, and is covered by the general name of "land." And that upon the breach of the condition, no new estate was acquired so as to require words applicable to after acquired estates to be found in the will.

The possibility of reversion was a contingent interest that existed in the testator when the will was made; the subsequent breach of the condition gave a right of entry by which the contingent interest might be converted into an estate in possession.

*Held*, also, that "a condition of re-entry," or condition strictly so-called, as distinguished from a conditional "limitation," is a means by which an estate or interest is to be prematurely defeated and determined, and no other estate created in its room. The condition in this case was perfectly valid. The devisees, and not the heirs of J. LeB. were consequently

held entitled to the land or the money representing it.

*W. H. Miller*, Q.C., for the petitioners, the devisees.

*Rae*, for the heirs-at law.

*MacLennan*, Q.C., for the infants.

Ferguson, J.]

[April 16.]

## HUGGINS V. LAW.

*Guardian of infants—Right to receive infants' legacies.*

This was an action brought by certain legatees against the executors of the will under which they claimed, claiming the amount of their legacies. It appeared that the will devised the real and personal estate among the plaintiffs and certain other parties share and share alike; that the executors had collected the estate, converted it into money, and invested the proceeds on mortgage security, and had paid the other legatees their legacies on their attaining their respective majorities; but as to the plaintiffs' legacies, they being infants, the defendants had paid their legacies over to their guardian duly appointed by the Surrogate Court. The guardian afterwards absconded with the amount of the legacies; and the plaintiffs brought this action accordingly.

*Held*, that the defendants by their dealings with the estate had put themselves in the position of trustees as to the moneys aforesaid, and they were wrong in paying it over to the guardian, and judgment must go for the plaintiffs, with costs.

*Guthrie*, Q.C., and *Watt*, for the plaintiffs.

*Bain*, Q.C., and *Scanlon*, for the defendants.

Boyd, C.]

[May 5.]

## DOBBIN V. DOBBIN.

*Dower—Husband and wife—Equitable dower—Equity of redemption.*

The plaintiff claimed dower against the heir-at-law of the intestate who created a mortgage on the lands prior to his marriage, which mortgage was still unsatisfied. He died possessed of no other property.

*Held*, that the mortgage being paramount to the wife's dower, which attached only upon

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the equity of redemption she could not found any claim to have the heir's estate operated with the payment of this mortgage in order to give her the full measure of her dower at law, and if she sought more than dower on the value of the estate after deducting the amount of the mortgage, she must contribute rateably to the payment of that encumbrance: that this was to be worked out in this way—getting one-third of the rents and profits for life she may keep down the one-third of the interest attributable to the mortgage debt for the like period. The yearly value of her dower was to be ascertained by deducting from one-third of the rents, issues and profits of the whole estate one-third of the yearly interest of the mortgage, and with that basis the value of an annuity to produce that sum during her life must be computed according to the methods usually employed in fixing a gross sum for dower.

*Poussette*, Q.C., for the plaintiff.

*Dumble*, for the defendant.

Boyd, C.]

[May 5.

#### BOYER V. GAFFIELD.

*Fraudulent conveyance—Lapse of time—Statute of Limitations.*

This was an action brought by a judgment creditor having unsatisfied writs in the hands of the sheriff, seeking to set aside a certain voluntary deed of conveyance made by the judgment debtor in September, 1873, of certain lands and premises, alleging that the said judgment debtor was then largely in debt, and that the plaintiffs' debt was then still unpaid. The defendants, the grantees under the voluntary conveyance, set up that, even if the plaintiffs ever had any right to resort to the said lands for the recovery of the debt, such right had been extinguished and lost by the delay.

*Held*, that inasmuch as the plaintiffs' debt was shewn to have existed prior to the deed of conveyance impeached, which conveyance was of an entirely voluntary character, the plaintiff was entitled to the relief claimed; for a deed which is by the statute of Elizabeth fraudulent as to creditors is not validated because it has not been attacked for ten or twenty years. It is a fraudulent deed, and it

remains so to the end of time, though it may be not effectively impeachable because of purchasers for value without notice having intervened, or because the claims of all creditors have been barred or extinguished by lapse of years, neither of which elements obtained in the present case.

*Hoyles and Riddell*, for the plaintiffs.

*W. Cassels*, Q.C., and *J. W. Kerr*, for the defendant.

Boyd, C.]

[May 5.

#### RE TRENT VALLEY CANAL.

RE WATER STREET AND THE ROAD TO  
THE WHARF.

*Highway—Property in soil—Expropriation—Compensation.*

This matter reported *ante*, p. 183, having been amended by adding the Attorney-General of Ontario as a party, was re-argued, when it was *Held*, that the soil of the roads was vested in the Crown represented by the Attorney-General of Ontario, and to him as a public officer the compensation is payable. Even if there was jurisdiction, the discretion of the Attorney-General, or rather that of the Lieutenant-Governor in Council, as to the ultimate disposition of the fund, should not be interfered with. When the highway is no longer needed for public use the infallible justice of the Crown will regard the rights of all interested.

*McCarthy*, Q.C., and *Barron*, for Smith.

*Irving*, Q.C., for the Ontario Government.

*G. T. Blackstock*, for the corporation of Fenelon Falls.

*Nelson*, for the Dominion Government.

*McMichael*, Q.C., for a mortgagee.



[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

## PRACTICE.

Boyd, C.]

[March 31.]

## RE MORPHY.

*Administration order—Judgment, entry of—Execution creditor of legatee—Receiver—Mistake—Action.*

A summary order was made for the administration of the personal estate of M. deceased. The order was not entered as a judgment, as it should have been by rule 485, owing to a mistake of an officer of the Court. The London and Canadian Loan and Agency Co., who were execution creditors of one of the legatees and devisee of M., obtained an order appointing the company receiver of the share of the execution debtor, and served notice of this receivership upon the executors of M., but received no notice of the proceedings under the administration order. The company, however, were informed of the proceedings, and upon an *ex parte* motion procured the administration order to be properly entered as a judgment, and then applied for the carriage of the proceedings under it.

*Held*, that the status of the company was not that of assignee of the legatee, but only of a chargee or lien holder upon the fund or property to which the legatee was entitled; and therefore, the company would not have been entitled in the first instance, to ask *in invitum* for a summary order to administer; and the slip which was made in not having the order to administer properly entered did not give them any additional right in that respect; but notice of the proceedings should have been given to the company in order that they might be bound by what was done.

A receiver appointed as the company were here has a right to assert his claims actively, though he may require in some instances the sanction of the Court; and, a contention having been raised as to a forfeiture of the interest of the legatee, leave was given to the company to assert their claim by an action.

*Arnoldi*, for the company.

*Moss, Q.C.*, and *Millar*, contra.

Boyd, C.]

[May 3.]

## MCCAW V. PONTON.

*Appeal—Setting down—Dies non—Objection.*

An appeal from an order made by a local master on Saturday, the 17th April, in an action in the Chancery Division, was set down to be heard on Monday, the 26th April, which was Easter Monday and a *dies non*. The appeal was put upon the paper for the following Monday.

*Held*, that the practice followed was a convenient one, and an objection to it was overruled.

*Held*, also, that the proper mode of taking such an objection was by motion to strike the appeal out of the list.

*Neville*, for the appellant.

*E. Douglas Armour*, for the respondent.

Armour, J.]

[May 4.]

## LAIDLAW MANUFACTURING CO. V. MILLER.

*Judge in Chambers—Divisions of High Court—Distribution of business.*

There is now only one Superior Court of original jurisdiction—the High Court of Justice. The different divisions exist merely for convenience in the distribution of work. There is no reason why a judge of the Queen's Bench or Common Pleas Division should not hear a Chambers motion in an action in the Chancery Division, even where it is not a matter of urgency, and where it might as easily have been brought before a judge of the Chancery Division.

*W. H. P. Clement*, for the plaintiffs.

*Holman*, for the defendants.

Boyd, C.]

[May 5.]

## GOULD V. BEATTIE

*Slander—Particulars—Examination.*

An order for particulars, under the statement of claim in an action of slander, of the names of the persons to whom the alleged slander was spoken, was rescinded because the examination of the plaintiff gave to the defendant all the discovery that he sought to obtain by the order for particulars.

*Fullerton*, for the plaintiff.

*Allan Cassels*, for the defendant.

## CORRESPONDENCE—OSGOODE HALL LIBRARY.

## CORRESPONDENCE.

## SURROGATE COURT FEES.

To the Editor of the LAW JOURNAL :

SIR,—Suppose A makes his promissory note for \$1,000,000, payable to B three months after date ; and at the same time B makes his promissory note payable to A for a like amount and at the same time. Before the three months are up B dies, and his executors seek to have his will proved. B's total assets amount to \$1,000 and the promissory note. Is the total estate to be administered \$1,000, or \$1,000,000? The million dollar note is wiped out by a million dollar debt ; but according to the judgment of Mr. Justice Cameron in *Re Kerr*, 44 Q. B. p. 210, in computing the amount of duty payable under the Surrogate tariff, the assets of the estate are to be computed and the liabilities ignored. If this be the law, and it seems to have been so held in the case referred to, it calls for the prompt attention of our legislature.

Yours truly,

C.

## COUNTY COURT JUDGMENTS.

To the Editor of the LAW JOURNAL :

SIR,—I desire to correct the statement of facts in the cases of *Parsons and Duncan v. Turner*, and *Madill v. Turner*, reported *ante*, 167. As I understand it, the facts were that Turner absconded. Before leaving he assigned his books to his father who was surety for him to Madill. Parsons and Duncan sued Turner, and got judgment on 17th December, and at the same time obtained judgment against Smith as garnishee for \$87. Madill got two judgments the same day ; and on 30th December and 2nd January following filed transcripts in the County Court, issued execution, and gave it to the sheriff on 2nd January. The garnishee paid the money into the Division Court for P. and D. Madill's solicitor, who was collecting the account on Turner's books, on 2nd January paid sheriff \$9.75 for defendant Turner, and the sheriff entered that sum in the book as required by section 2 of Creditors Relief Act. Hayes notified

the clerk of Division Court not to pay over to P. and D., and then applied to Judge Dartnell for an order for the clerk to pay the \$87 over to the sheriff, and the judge made the order. Now this application and order were made in the suit of *Parsons and Duncan v. Turner*, on the application of Madill in the name of the sheriff, without any notice whatever to Parsons and Duncan. It was objected that the judge had no power to make such an order on the application of a stranger. On this his judgment is silent. It was also objected that the Creditors Relief Act did not apply as it was clear that Act was intended for all creditors, whereas no creditors could get certificates under sec. 7, as the debtor's goods had not been advertised by the sheriff, and that the payment of the \$9.75 to the sheriff, if not really paid by Madill, as contended, was a voluntary payment by the defendant, and such payments could not *per se* have the effect of putting the Act in force. These points are not touched upon in the judgment.

Yours, etc.,

LEX.

## OSGOODE HALL LIBRARY.

The following is a list of books received at the Library during the months of January, February and March, 1886 :—

Armstrong on Intestacy, Montreal, 1885 ; Beach on Contributory Negligence, New York, 1885 ; Beach on Sterling Exchange, New York, 1885 ; Browning & Lushington's Admiralty Reports, London, 1868 ; Bules on Bills, 14th edition, London, 1885 ; Birbeck's Distribution of Land in England, London, 1885 ; Bishop's Directions and Forms, Boston, 1885 ; Cababé & Ellis' Reports, Vol. I., London, 1885 ; Criminal Law Magazine, Vol. VI., Jersey City, 1885 ; Central Law Journal, Digest to Vols. I. to XX., St. Louis ; Carver on Carriage of Goods by Sea, London, 1885 ; Challis' Real Property, London, 1885 ; Clerke & Humphrey's Sales of Land, London, 1885 ; Dicey's Law of the Constitution, London, 1885 ; Danforth's U. S. Supreme Court Digest, New York, 1885 ; Dos Passos on the Stock Brokers, etc., New York, 1882 ; Desty's Federal Reporter Digest, St. Paul, 1885 ; Emden's Practice Statutes, London, 1885 ; Emden's Digest for 1885, London, 1886 ; Erma-tinger on Franchise of Elections, Toronto, 1886 ; Gray on Telegraphic Communication, Boston, 1885 ; Goodeve's Real Property, 2nd edition, London, 1885 ; Hincks (Sir F.), Life of, Montreal, 1884 ; Haight's Country Life in Canada, Toronto

## OSGOODE HALL LIBRARY—FLOTSAM AND JETSAM.

1885; Hansard's Debates, Vols. 293-301, London, 1884-5; High's Extraordinary Legal Remedies, Chicago, 1884; Journal of Jurisprudence, Vol. 29, Edinburgh, 1885; Jackson's "Century of Dishonour," Boston, 1886; Kansas Reports, Vols. 1-33, Topeka; Leigh & Le Marchant on Elections, 4th edition, London, 1885; Lely & Foulke's Parliamentary Election Acts, London, 1885; Lawrence's Public International Law, Cambridge, 1885; Lewis on Shipping, Toronto, 1886; Mackenzie's Life of the Hon. Geo. Brown, Toronto, 1882; Morris' Treaties with the Indians, Toronto; Mew's Digest for 1885, London, 1886; Mair's Drama, "Tecumseh," Toronto, 1886; Murfree on Official Bonds, St. Louis, 1885; North-Eastern Reporter, Vol. 1, St. Paul, 1885; Piggott on Torts, London, 1885; Pulling's Index to London Gazette, London, 1885; Roberts & Wallace on Employers, 3rd edition, London, 1885; Reed on Statute of Frauds, 3 vols., Philadelphia, 1884; Stephen's Dictionary National Biography, Vol. 5, London, 1886; Whittaker's Almanac for 1886; Williams' Real Property, 15th edition, London, 1885; Wood on Mandamus, Albany, 1880; Wallace's "Bad Times," London, 1885.

## FLOTSAM AND JETSAM.

THE *San Francisco Wasp* says a jury is "a number of persons appointed by a court to assist the attorneys in preventing law from degenerating into justice"; which is lucky for the newspapers.—*Albany Law Journal*.

ONE of the most characteristic remarks ever heard from a Welsh witness was elicited in the course of a recent trial. The witness, after answering a question in chief, blandly inquired of the examining counsel, "Have I said right?"—*Irish Law Times*.

THE Supreme Court of the United States in *Little v. Hackett* holds that a person who hires a public hack, and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, or prevented from recovering against a railroad

company for injuries suffered from a collision of its trains with the hack, caused by the negligence of both the managers of the train and of the driver.—*Albany Law Journal*.

It cannot be said that England does not pay its judicial officers well. The recent death of the second Lord Brougham, at the age of ninety-one, will relieve the Government from the payment of a pension of \$3,225 a year, which was granted in 1852, on the abolition of the office of Master in Chancery, which he held. Thus in thirty-three years the Government must have paid that person about \$532,000. Great reforms cost, it seems. It must have cost much more for England to get rid of that office than it cost this State to get rid of the common-law practice.—*Albany L. J.*

INSURANCE agents may note that it has been held in the United States in *Crandel v. Accident Insurance Co.* (Chicago Legal News, Ap. 10), that death by hanging, when insane is a death from bodily injury, effected through "external, accidental and violent means," within the meaning and intent of a policy of accident insurance. The policy in this case provided that the insurance should not extend to death or disability, "which may have been caused wholly or in part by bodily infirmities or disease." Held, that the death of the insured was not caused within the meaning of the law or the intent of the policy, by the disease of insanity, but by the act of self destruction.

SOME time ago we alluded to a hard case, where a man convicted of manslaughter appealed, and obtained a new trial, and then was convicted of murder and sentenced to be hanged. It is now stated in the newspapers that he has appealed to the Federal Supreme Court. This is a good way to get his case "hung up," if he himself is not. It seems that there is an element of mitigation in his case. The killing grew out of a dispute over the spelling of the word "pedler." Inasmuch as the standard lexicographers spell it in several different ways, one might reasonably be excused for falling into a homicidal passion on the subject. We ourselves have more than once refrained from immolating a proof-reader for a like cause, only by powerful exercise of the will, especially when he has calmly corrected a word purposely misspelled.—*Albany Law Journal*.

## FLOTSAM AND JETSAM.

UNIQUE VERDICT OF CORONER'S JURY.—"State of Arkansas, County of ———, Township of ———, an inquisition taken this 4th day of February, 1886, ——— J. P. for the county aforesaid upon the view of the Dead Boddie of ———, who is about 5 ft. 6½ high, weigh about 130 pounds, dark complected, find that he came to his death by ——— Special Deputy Constable, the said ——— attempted to kill the said ——— who after a tussle, managed to shoot him with a shot gun, which shot taken affect in the stomach & killed him the said ———, who was proved to be a desperate character from the evidence & according to Law we the undersigned Justice & Jurors find that ——— did the killing in *extreme justifiable homicide* and that he done it to save his own life—\$2.15 was found on his person which was used to pay for a coffin and a bottle of whiskey."

There is a painful ambiguity in the last sentence of this verdict. Was the \$2.15 used to pay for the coffin, and for a bottle of whiskey? Or was the bottle of whiskey, as well as the money, found upon the person of the deceased? As there is no probability that the verdict will be amended, there is scope for conjecture. As the deceased was found to be a "desperate character," and came to his end after a "tussle," the presumption would be that any bottle found on his person would be a whiskey bottle, empty, not a bottle of whiskey. We are therefore led to the conclusion that the bottle of whiskey was bought with the money—to console the survivors.—*Ex.*

The following is taken from the January number of the *Law Quarterly Review*. It is a very interesting reminiscence:—

OXFORD, 23 June, 1753.

In Michaelmas Term next will begin

A

# COURSE of LECTURES ON THE LAWS of ENGLAND.

By DR. BLACKSTONE, of All-Souls College.

THIS Course is calculated not only for the Use of such Gentlemen of the University, as are more immediately designed for the Profession of the Common Law; but of such others also, as are desirous to be in some Degree acquainted with the Constitution and Polity of their own Country.

To this End it is proposed to lay down a general and comprehensive Plan of the Laws of England; to deduce their History; to enforce and illustrate their leading Rules and fundamental Principles; and to compare them with the Laws of Nature and of other Nations; without entering into practical Niceties, or the minute Distinctions of particular Cases.

The Course will be completed in one Year; and, for greater Convenience, will be divided into four Parts; of which the first will begin to be read on *Tuesday* the 6th of *November*, and be continued three Times a Week throughout the Remainder of the Term: And the following Parts will be read in Order, one in each of the three succeeding Terms. Such Gentlemen as propose to attend this Course (the Expence of which will be fix Guineas) are desired to give in their Names to the Reader some Time in the Month of *October*.

\*.\* The broadsheet of which the above is a reduced facsimile, and of which I am not aware that another copy has been preserved, was found by me in a recently purchased copy of the now somewhat rare "*Privilegia Universitatis*." It would be interesting to know more of the circumstances which attended the beginnings of the study of the Common Law at Oxford. Blackstone's brother-in-law and biographer, Clitherow, in the preface to the Reports, tells us that the lectures of 1758 "even at their commencement, such were the expectations formed from the acknowledged abilities of the lecturer, were attended by a very crowded class of young men of the first families, characters, and hopes." In 1758 Blackstone was elected to the newly founded Vinerian Professorship, and Bentham, who had returned to Oxford early in December, 1763, writes as follows: "I attended with two colleagues of my acquaintance. One was Samuel Parker Coke, a descendant of Lord Coke, a gentleman commoner, who afterwards sat in Parliament and the other was Dr. Downes. They both took notes, which I attempted to do, but could not continue it, as my thoughts were occupied reflecting on what I heard. I immediately detected his fallacy respecting natural rights. . . . Blackstone was a formal, precise and affected lecturer, just what you would expect from the character of his writings; cold, reserved and wary; exhibiting a frigid pride. But his lectures were popular, though the subject did not then excite a wide-spreading interest, and his attendants were not more than thirty to forty" (Works, x. p. 45). Lord Eldon in the case of *Abernethy v. Hutchinson* (1825), 8 L. J. Ch. 209 (for a reference to which I am indebted to the present holder of the Vinerian chair, Professor Dicey), says: "We used to take notes at his [Blackstone's] lectures. At Sir R. Chambers' lectures also the students used to take notes." It must however be remarked that Eldon did not matriculate till 15th May, 1766, the year in which Blackstone finally severed his connection with Oxford, after for some time previous lecturing by deputy. He had resumed his London practice in 1769, and in 1761 had entered Parliament and had become a King's Counsel. The Vinerian Professor's statutory right of reading by deputy, upon which Blackstone had successfully insisted in 1761, was very amply conceded to his successor, Sir R. Chambers, who held the office for three years after he had gone out as a judge to India (1774-77). The future Lord Eldon was duly appointed to be his deputy, at a salary of £60 per annum, and as such (according to the story which he told long afterwards) had to read, soon after his elopement with Bessy Surtees, "with about 140 boys all giggling at the Professor," a previously unseen lecture, sent to him by Chambers, upon the Statute 4 & 5 Phil. & M. c. 8, for the punishment of such as shall take away maidens that be inheritors, being within the age of sixteen years, or that marry them, without consent of their parents.

T. E. HOLLAND.

## FLOTSAM AND JETSAM—LAW SOCIETY OF UPPER CANADA.

**DEFAMATION OF CHARACTER.**—A rural justice of the peace is usually a man of good sense and sound judgment. He may not know much law, but the community trusts him to do substantial justice between man and man, even if he violates legal technicalities. Uncle Johnny Woodman, of Sumner county, West Virginia, knew more about farming than he did about books, but he was honest and shrewd, and his common sense never failed him. His neighbours elected him justice of the peace, and not long after his appointment he gave them an illustration of the fact that a bad name will make a man suspected when appearances are never so slightly against him.

One day a noted "hard case" was brought before Uncle Johnny, charged with stealing a horse. The evidence against the man was not very strong, and his lawyer, Gen. Bently, insisted that his client should be dismissed. But Uncle Johnny decided to commit him to gaol to await the action of the grand jury.

Gen. Bently then moved the Court to release the prisoner on bail, and offered good security for his appearance at the upper Court. Uncle Johnny adjusted his spectacles, examined the "code," and said with great dignity—

"The Court declines to bail the prisoner."

"On what grounds do you decline?" demanded the attorney.

"Well, General," said Uncle Johnny, "if you must know, the Court is afraid he'll steal another horse."

"You had better be careful," replied the lawyer.

"My client will sue you for his character."

"You needn't put yourself to the trouble," rejoined the magistrate, with provoking coolness. "Just get two or three disinterested men to say what his character is worth, and I'll pay for it on the spot."—*Criminal Law Magazine*.

## Law Society of Upper Canada.

## SUBJECTS FOR EXAMINATIONS.

*Articled Clerks.*

- 1884 and 1885. { Arithmetic.  
Euclid, Bb. I., II., and III.  
English Grammar and Composition.  
English History—Queen Anne to George III.  
Modern Geography—North America and Europe.  
Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

*Students-at-Law.*

1884. { Cicero, Cato Major.  
Virgil, Æneid, B. V., vv. 1-361.  
Ovid, Fasti, B. I., vv. 1-300.  
Xenophon, Anabasis, B. II.  
Homer, Iliad, B. IV.
1885. { Xenophon, Anabasis, B. V.  
Homer, Iliad, B. IV.  
Cicero, Cato Major.  
Virgil, Æneid, B. I., vv. 1-304.  
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb, I., II. and III.

## ENGLISH.

A Paper on English Grammar. Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George II. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

## FRENCH.

A paper on Grammar,

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

## LAW SOCIETY OF UPPER CANADA.

## OF NATURAL PHILOSOPHY.

Books—Arnot's elements of Physics, and Somerville's Physical Geography.

*First Intermediate.*

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

*Second Intermediate.*

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

*For Certificate of Fitness.*

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

*For Call.*

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchor, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six

## LAW SOCIETY OF UPPER CANADA.

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchers, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## FEES.

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

## PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890.

*Students-at-law.*

## CLASSICS.

1886.	Cicero, Cato Major.
	Virgil, <i>Æneid</i> , B. I., vv. 1-304.
	Cæsar, <i>Bellum Britannicum</i> .
	Xenophon, <i>Anabasis</i> , B. V.
	Homer, <i>Iliad</i> , B. VI.
1887.	Xenophon, <i>Anabasis</i> , B. I.
	Homer, <i>Iliad</i> , B. VI.
	Cicero, <i>In Catilinam</i> , I.
	Virgil, <i>Æneid</i> , B. I.
1888.	Cæsar, <i>Bellum Britannicum</i> .
	Xenophon, <i>Anabasis</i> , B. I.
	Homer, <i>Iliad</i> , B. IV.
	Cæsar, B. G. I. (vv. 1-33.)
1889.	Cicero, <i>In Catilinam</i> , I.
	Virgil, <i>Æneid</i> , B. I.
	Xenophon, <i>Anabasis</i> , B. II.
	Homer, <i>Iliad</i> , B. VI.
1890.	Cicero, <i>In Catilinam</i> , II.
	Virgil, <i>Æneid</i> , B. V.
	Cæsar, <i>Bellum Britannicum</i> .

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's *Arnold's Composition*, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

## MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

## ENGLISH.

A Paper on English Grammar. Composition.

Critical reading of a Selected Poem:—

1886—Coleridge, *Ancient Mariner* and *Christabel*.

1887—Thomson, *The Seasons*, Autumn and Winter.

1888—Cowper, *the Task*, Bb. III. and IV.

1889—Scott, *Lay of the Last Minstrel*.

1890—Byron, *the Prisoner of Chillon*; Child Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

## HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe. Optional Subjects instead of Greek:—

## FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886	} Souvestre, <i>Un Philosophe sous le toits</i> .
1888	
1890	
1887	} Lamartine, <i>Christophe Colomb</i> .
1889	

## OF, NATURAL PHILOSOPHY.

*Books*—Arnot's *Elements of Physics*; or Peck's *Ganot's Popular Physics*, and Somerville's *Physical Geography*.

## ARTICLED CLERKS.

Cicero, Cato Major; or, Virgil, *Æneid*, B. I., vv. 1-304, in the year 1886: and in the years 1888, 1889, 1890, the same portions of Cicero, or Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe. Elements of Book-Keeping.

Copies of Rules can be obtained from Messrs Rowse & Hutchison.

# Canada Law Journal.

VOL. XXII.

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NO. 11.

## DIARY FOR JUNE.

1. Tue....Maritime Court Sittings begin.
2. Thur....*The Ascension Day*.
3. Fri....Lord Ch. Justice born 1751.
4. Sat....Easter Sittings of Q. B. and C. P. Div. end, unless shortened or extended by Rule of Court.
5. Sun....*Sunday after Ascension*.
6. Mon....Sitting of Supreme Court of Canada begin.
7. Tue....C. C. Sittings for trials commence, except in York.
8. Wed....*Whit Sunday*.
9. Mon....C. C. York term begins.
10. Tue....Magna Charter signed 1215.

TORONTO, JUNE 1, 1886.

WE notice in a recent issue of the *London Times* a paragraph stating that arrangements are in progress for the opening of a telephone office at the Royal Courts of Justice for the convenience of barristers, solicitors and other subscribers who may have business there, and that the office is expected to be completed and opened very shortly. We have had these facilities for some years past, and it is pleasant to see that civilization is marching eastward. Perhaps the march has indeed been westward, and has got round to England across the intervening continents.

Several of our subscribers have recently drawn our attention to what they claim to be the character of judicial work that prevails in Ontario at present, and not the least so in respect to judgments delivered by some of the judges at Osgoode Hall. It is asserted that they are too often "slipshod" and careless, more in the nature of lay awards than legal judgments—not the strict application of accepted principles of law to a certain state of facts. It might be found well to refer to this subject more at

length, as there would appear to be some ground for the complaint. An article in the pages of our English namesake, which we republish in another place, has some observations which are not entirely inappropriate to the views which our friends alluded to above would seem to hold.

## THE VENDORS AND PURCHASERS ACT.

IN 1876 a useful provision was placed on the Statute book enabling many controversies between vendors and purchasers to be disposed of by the Court of Chancery in a summary manner which could formerly have only been determined by a suit. This provision is embodied in R. S. O., c. 109, s. 3, and was copied from the Imperial Statute, 37 & 38 Vict. c. 78, s. 9. It provides that "a vendor or purchaser of real or leasehold estate, or their representatives respectively, may at any time or times, and from time to time apply in a summary way to the Court of Chancery or a judge thereof in respect of any requisitions or objections, or any claims for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract); and the judge shall make such order upon the application as to him appears just, and shall order how and by whom all or any of the costs of suit incidental to the application shall be borne and paid."

The advantages which the Act holds out for the summary disposition of questions of title have not been so extensively recognized as they deserve. Latterly,



## THE VENDORS AND PURCHASERS ACT.

however, applications under the Act have been more numerous, and the broad and liberal interpretation which the Courts have given to the Act, both here and in England, is calculated to make it an exceedingly popular mode of disposing of disputes arising on contracts for the sale of land.

The jurisdiction to entertain applications under the Act was originally confined to the Court of Chancery; but under the Judicature Act the jurisdiction is now vested in all the Divisions of the High Court (J. A. s. 9).

Applications were formerly entertained in Chancery either in Court or in Chambers; but latterly the judges of the Chancery Division have decided that all petitions under the Act must be set down to be heard in Court on a Wednesday, and a copy of the petition must be left for the use of the judge at the time of its being set down for hearing. This regulation is due to the fact that questions of title cannot be satisfactorily disposed of in Chambers, where it is impossible to give them the deliberation they require, and because an offhand disposition of such matters might lead to serious consequences. In England, although such applications are always originated in Chambers, yet they may be adjourned into Court, and that is the course usually adopted: *Re Coleman & Farrom*, 4 Chy. D. 165, 168. No special regulations have been made as to the hearing of such applications under this Act in the Queen's Bench and Common Pleas Divisions of the High Court.

Questions affecting the existence or validity of the contract cannot be entertained under the Act; but the effect of this restriction has been the subject of conflicting opinions. In *Re Henderson & Spencer*, 8 P. R. 402, Spragge, C., notwithstanding that the existence of the contract was denied by the affidavit of the purchaser, nevertheless decided the ques-

tion of title raised by the petition, but without prejudice to the purchaser's right to file a bill to have the contract rescinded, or to resist a suit for specific performance; but in *Re Robertson & Daganeau*, 19 C. L. J. 19; 9 P. R. 288, Boyd, C., held that the existence of a dispute as to the validity of the contract virtually ousted the jurisdiction of the Court under the Act, and he refused to decide any matter affecting the title until the dispute as to the validity of the contract was disposed of. This probably is the more correct view, and the result of this construction of the statute is to confine the cases in which relief can be obtained under it to those in which the existence and validity of the contract are not disputed. But when a contract has been entered into, the jurisdiction of the Court will not be ousted by one of the parties subsequently claiming the right to rescind it. But the Court may, and in more than one reported case has, upon an application under the Act, determined the question whether the party claiming the right to rescind the contract has in fact the right so to rescind.

In *Re Burroughs*, 5 Chy. D. 601, James, L.J., stated what he considered to be the scope and object of the Act, thus: "My opinion is that upon the true construction of this Act of Parliament, whatever could be done in Chambers upon a reference as to title under a decree when the contract was established can be done upon proceedings under this Act, and that what this Act has done is this: it has enabled the parties to dispense with the form of a bill and answer, and at once to put themselves in Chambers, in exactly the same position in which they would have been, and with all the rights which they would have under the old form of decree": and this view was concurred in by the other members of the Court of Appeal, and was subsequently adopted by Spragge, C., in *Re Eaton*, 7 P. R. 396. A *dictum* of James,

## THE VENDORS AND PURCHASERS ACT.

L.J., however, occurs in the same case, and also in *Re Popple v. Barratt*, 25 W. R. 248, an earlier case, which is cited in the text-books, which, we think, is calculated to mislead, to the effect that the Act does not enable the Court to try disputed questions of fact. That remark was made in the course of the argument in *Re Burroughs*, and, we think, will be seen is at variance with the decision ultimately arrived at. In that case the question was whether on the conflicting evidence presented to the Court by affidavits and cross-examinations thereon, (and which the Court held to be admissible), the plaintiff had established a title to the soil of the land in question, or merely to a right of pasturage, and the Court in effect did try the disputed question of fact presented by the evidence, and found that the vendor had established a title to the soil.

It is, we therefore think, clear that questions of fact, as well as questions of law, arising upon the investigation of any title, may be inquired into and determined upon a summary application under the Act, and that whatever evidence would be admissible in the Master's Office upon a reference as to title, as to any question of fact, is equally admissible upon a summary application under this statute.

Applications under the Act are usually made in this Province by petition, and the only parties necessary to be brought before the Court upon such applications are those who would be necessary parties to an action for specific performance: *Re Eaton*, 7 P. R. 396; and as a general rule only the parties to the contract are necessary parties to a suit for specific performance, Fry (2nd Ed.), 62, 73. Parties who are unnecessarily served with the petition will be dismissed with costs: *Re McNabb*, 1 Ont. R. 94.

The decision of the Court on the question presented is only technically binding upon those who are actually parties to the

application; and third persons who are not parties are not precluded from subsequently disputing the correctness of the decision which may be arrived at (see *Osborne to Rowlett*, 13 Chy. D., per Jessel, M. R., at p. 781). Whenever, however, the question of title is doubtful, the Court does not, as a rule, determine it in favour of the vendor, but is always guided in applications under the statute by the doctrine of equity "that a purchaser is not to be compelled to accept a doubtful title."

Under this statute almost any question arising in the investigation of the title, or as to the construction of the contract or liability thereunder, may be determined. In very many cases the Court has construed wills: *Re E. Williams*, 26 Gr. 110; *Re Eaton*, 7 P. R. 396; *Givins v. Darvill*, 27 Gr. 502; *Re McNabb*, 1 O. R. 94; *Re Casner*, 6 O. R. 282; *Re Winstanley*, *Ib.* 315; *Re Cooke*, 8 O. R. 530; *Re Brown & Sibly*, 3 Chy. D. 156; *Re Coleman & Jarrom*, 4 Chy. D. 165; *Re White & Hurdle*, 7 Chy. D. 201; *Re Methuen & Blore*, 16 Chy. D. 696; *Re Sturge & G. W. Ry. Co.*, 19 Chy. D. 444; *Re Portal & Lamb*, 27 Chy. D. 600; 30 Chy. D. 50; *Re Fisher & Haslett*, 13 L. R. Ir. 546; *Re Parry & Daggs*, 31 Chy. D. 130.

It has also construed the contract: *Re Gray & Metropolitan Ry. Co.*, 44 L. T. N. S. 567; and has determined whether the conditions of sale under which the purchaser bought are misleading: *Re Marsh & Granville*, 24 Chy. D. 11; *Cumming v. Godbolt*, 29 N. J. 27; W. So (84) 204. Whether a purchaser or vendor is entitled to compensation for misdescription in the advertisement and particulars of sale: *Re Turner & Skelton*, 13 Chy. D. 130; *Orange to Wright*, 52 L. T. N. S. 606; 54 L. J. Chy. 590. Whether a particular covenant claimed by the purchaser should be inserted in the deed from the vendor: *Re Gray & Metropolitan Ry.*

## THE VENDORS AND PURCHASERS ACT.

*Co.*, *supra*; *Re Sawyer & Baring*, 33 W. R. 26. Whether the purchaser was bound to enter into restrictive covenant with the vendor: *Re Moody & Cowan*, 51 L. T. N. S. 721; and also what parties should join in the conveyance to the purchaser: *Re Waddell*, 2 Chy. D. 172. Whether a liquidator of a company had power to affix the seal of the company to the deed to the purchaser: *Re Metropolitan Bank & Jones*, 2 Chy. D. 366. Whether a vendor is bound to deliver an abstract of title: *Re Johnston & Tustin*, 30 Chy. D. 42, 53 L. T. N. S. 281. Whether a vendor is bound to give evidence to show that he had duly performed his covenants with his lessor: *Re Moody & Yates*, 28 Chy. D. 661. Whether a married woman could convey without her husband joining in the deed: *Re Coulter*, 8 O. R. 536. The Court has also under the Act determined whether an estate bail has been barred: *Re Dudson*, 8 Chy. D. 628; and whether the legal estate is outstanding: *Re Packman & Moss*, 1 Chy. D. 214; *Re Kearley & Clayton*, 7 Chy. D. 615; *Re Mercer & Moore*, 14 Chy. D. 287; *Davis & Jones*, 24 Chy. D. 190. Also whether the consent of beneficiaries is necessary: *Re Mavis Trusts*, W. N. (80) 141; *Re Earle v. Webster*, 24 Chy. D. 144; *Re Tweedie & Miles*, 27 Chy. D. 315. Also whether the vendors have power to sell under a power of sale under which they have assumed to act: *Re Cooke*, 4 Chy. D. 454; *Re Ford*, 15 C. L. J. 108; *Re Tanqueray v. Laudan*, 20 Ch. D. 465; *Osborne to Rowlett*, 13 Ch. D. 774; *Re Morton & Hallett*, 15 Ch. D. 143; *Re Inglehart & Gagnier*, 29 Gr. 418. Whether an administrator with the will annexed can exercise a power of sale: *Re Clay & Titley*, 16 Chy. D. 3. And whether the assignee of a mortgage can exercise a power of sale contained in the mortgage: *Re Gilchrist & Island*, *ante*, p. 147. Whether trustees have a power of sale: *Sutton to Church*, 26 Ch. D.

173; *Re McAuliffe & Balfour*, 50 L. T. N. S. 353; *Re Wright*, 28 Chy. D. 93. Whether trustees have been properly appointed: *Re Glenney & Hartley*, 25 Chy. D. 611. Whether requisitions have been properly answered: *Re Rayner & Greenway*, 53 L. T. N. S. 495; *Re Burroughs*, 5 Chy. D. 601. Whether an option to purchase had been validly granted by a trustee under which the vendor claimed title: *Hallett to Martin*, 24 Chy. D. 624. Whether the vendor has a right to rescind the contract; *Re Jackson & Oakshott*, 14 Chy. D. 851; *Re G. N. R. W. Co. & Sanderson*, 25 Chy. D. 788; *Re Deptford Creek Bridge Co. & Beavan*, 27 So J. 312; *Re Dames & Wood*, 27 Ch. D. 172, 29 Ch. D. 626; *Re Monckton & Gilsean*, 27 Ch. D. 555, 51 L. T. N. S. 320. Whether the Court had power to make an order: *Re Hall-Dare*, 21 Chy. D. 41; the effect of recitals in a deed: *Re Harman & Uxbridge Ry.*, 24 Chy. D. 720. The Court has also determined whether a purchaser is liable to pay interest, and from what term it should run: *Re Gold & Norton*, 52 L. T. N. S. 321; 33 W. R. 33; *Re Pigott & G. W. R. W. Co.*, 18 Chy. D. 146, and at what rate: *Ib. Monckton & Gilsean*, *supra*; and where interest has been paid by the purchaser under a mistake of law, the Court has ordered it to be refunded by the vendor: *Re Young & Harston*, 31 Chy. D. 168; 53 L. T. N. S. 837; in this case, however, an objection to the jurisdiction, which had been taken and allowed in the Court of first instance was waived on the appeal.

The Court, when it finds the title of the vendor defective, may give him time to remedy the defect, and in default may declare a good title has not been shown, and order him to refund the purchaser's deposit with interest; *Re Metropolitan Ry. & Cosh*, 13 Chy. D. 607; 42 L. T. N. S. 73. *Re Smith & Stott*, 48 L. T. N. S. 513, and may also order him to pay the costs of the purchaser of investigating the title, and

## THE VENDORS AND PURCHASERS ACT—RECENT ENGLISH DECISIONS.

the application which may be charged on the vendor's interest in the property; *Re Higgins & Hitchman*, 21 Chy. D. 95, 99; *Re Yidding & Westbrook*, 31 Chy. D. 344.

On the other hand, where the Court is of opinion that the vendor has made out his title, it may proceed by order to enforce the contract, and it is improper in such a case for a vendor to commence an action for specific performance: *Thompson v. Ringer*, 44 L. T. N. S. 507; 29 W. R. 520; *Re Craig*, 18 C. L. J. 317; 10 P. R. 33.

The costs of applications under the Act are in the discretion of the Court. The general rule is to make them follow the event, and when the purchaser succeeds the vendor is usually ordered to pay the costs: *Re Packman & Moss*, 1 Chy. D. 214; *Re Mercer & Moore*, 14 Chy. D. 287; *Jackson & Oakshott*, *Ib.* 851; *Re Clay & Taley*, 16 Chy. D. 3; *Re Methuen v. Blore*, 16 Chy. D. 696; *Hallett & Martin*, 16 Chy. D. 624, 633; and where the purchaser fails he is usually ordered to pay the costs: *Re Waddell*, 2 Ch. D. 172; *Re Cooke*, 4 Ch. D. 454; *Re Burroughs*, 5 Ch. D. 601; *Re Ford & Hill*, 10 Ch. D. 365; *Re Turner & Skelton*, 13 Ch. D. 130; *Re Morton & Hallett*, 15 Chy. D. 143; *Re Warner*, 17 Chy. D. 711; *Re Pigott & G. W. Ry. Co.*, 18 Chy. D. 14; *Re Tanqueray & Landau*, 20 Chy. D. 465, 483; *Re Dames & Wood*, 27 Chy. D. 172; *Re Tweedie & Miles*, *Ib.* 315.

In some cases no costs have been given to either party, as where the point submitted was a fair subject for discussion; *Re Coward*, 20 Eq. 179; *Re Metropolitan Dist. Ky. & Cosh*, 13 Chy. D. 607, 613; or there were conflicting decisions: *Osborne to Rowlett*, 13 Chy. D. 774, 798, and see *Re Bellamy & Met. Board of Works*, 24 Chy. D. 387, 392; and where the vendors took advantage of a condition of sale which entitled them to rescind the contract, the Court, though holding the vendors were

entitled to rescind, nevertheless refused them their costs: *G. N. Ry. Co. v. Sander-son*, 25 Chy. D. 788; but in another case under similar circumstances costs were awarded to the vendor: *Dames & Woods*, 27 Chy. D. 172, 29 Chy. D. 626.

The general rule is to order costs to be paid by the purchaser when he fails, so as to assure his title and show that the Court entertains no doubt about it. Per Jessel, M. R., *Osborne to Rowlett*, 13 Chy. D. 798.

Where an application under the Act is heard (as is now invariably the rule in the Chancery Division) in Court, it follows that no appeal to a Divisional Court can be had from the decision, except by consent of both parties: Rule S. C. 471; *McTiernan v. Fraser*, 9 P. R. 246; 18 C. L. J. 341; *Wansley v. Smallwood*, 10 P. R. 233. When the parties do not consent, the party desiring to appeal must carry the case to the Court of Appeal.

## RECENT ENGLISH DECISIONS.

The *Law Reports* for May include 16 Q. B. D., pp. 673-795; 11 P. D., pp. 29-55, and 31 Chy. D. pp. 503-690.

SOLICITOR AND CLIENT—TAXATION AFTER A YEAR—  
"SPECIAL CIRCUMSTANCES"—(R. S. O. 140, s. 35.)

In *re Norman*, 16 Q. B. D. 673, was an application by a client to tax his solicitor's bill after the lapse of twelve months from its delivery. The bill in question contained the following charges:—£735 for costs of an action and a reference lasting six days, and £83 for witnesses' expenses, no part of this sum having been paid by the solicitor, but nearly the whole of it had been paid by the client, and the rest had never been paid. The bill also contained a charge of £71 for shorthand notes of the proceedings which had been taken by the solicitor's clerk, but it did not appear that the clerk had been paid any part of the £71 charged, the charge being made on the scale usually charged by professional shorthand writers. Stephen, J., considering these charges

## RECENT ENGLISH DECISIONS.

in the bill constituted "special circumstances," had ordered a taxation, his order was affirmed by the Divisional Court of the Queen's Bench Division (Mathew and A. L. Smith, JJ.), and the latter decision was now affirmed by the Court of Appeal. The court was pressed with the rule laid down by Cotton, L.J., *In re Boycott*, 29 Chy. D. 571, but the Court of Appeal refused to adopt it, and preferred that stated by Bowen, L.J., in the same case, as follows:

Special circumstances, I think, are those which appear to the judge so special and exceptional as to justify taxation. I think no court has a right to limit the discretion of another court, though it may lay down principles which are useful as a guide in the exercise of its own discretion.

**ADDING PARTY PLAINTIFF—CONSENT—ORD. XVI. RB. 2, 11**  
—(ONT. RULE 108 b).

The short point decided in *Tyron v. The National Provident Institution*, 16 Q. B. D. 678, by Mathew and A. L. Smith, JJ., was that under Ord. 16, r. 11, a party cannot be added as a co-plaintiff without his written consent, even though he be indemnified against costs. In the case of *Cox v. James*, 19 Chy. D. 55; 45 L. T. N. S. 471, decided under the English Rules of 1875, and which more nearly correspond with the Ont. Rule 103b, then the English Rules of 1883, it was held that it was not necessary that the consent of the party to be added should be in writing; and that it was sufficient that the solicitor for the existing plaintiff states that he has authority to consent on behalf of the party proposed to be added. Although a consent in writing is not necessary under our Rule, the consent must be given either in person or by counsel or solicitor.

**TRIAL—HOSTILE WITNESS—DISCRETION OF JUDGE—C. L. P. ACT, 1884, s. 22—(R. S. O. c. 62, s. 37).**

The case of *Rice v. Howard*, 16 Q. B. D. 681, is one in which the defendant, on a motion for a new trial, sought to review the discretion exercised by the judge at the trial as to permitting the defendant's counsel to treat one of his own witnesses as a hostile witness. At the trial, in order to show that the witness in question was adverse, the judge was asked to look at an affidavit made by the witness in a former action. The judge being of opinion that there had been nothing in the witness's demeanour, or in the way he had given his evidence, to

show that he was hostile, refused to look at the affidavit; and Grove and Stephen, JJ., were of opinion that the decision of the judge at the trial on this point was final and could not be reviewed.

**INTERPLEADER AS TO PART OF A CLAIM—(ONT. JUD. ACT, s. 17, ss. 6).**

In *Reading v. School Board for London*, 16 Q. B. D. 687, a Divisional Court of the Queen's Bench Division (Day and Wills, JJ.) affirmed the order of A. L. Smith, J., holding that a debtor against whom an action is brought, and who has had notice of an assignment of the debt, may interplead as to part only of the claim, and may dispute the residue.

**MUNICIPAL BY-LAW—UNREASONABLENESS—MUSIC IN STREET ON SUNDAY.**

In *Johnson v. Croydon*, 16 Q. B. D. 708, a Divisional Court, composed of Hawkins and Mathew, JJ., were called on to consider the validity of a municipal by-law, which provided that "no person, not being a member of Her Majesty's army or auxiliary forces, acting under the orders of his commanding officer, shall sound or play upon any musical instrument in any of the streets of the borough on Sunday."

The court held that the by-law in question was unreasonable, and *ultra vires*, inasmuch as it prohibited all music, however harmless or free from offence it might be, and they therefore quashed a conviction made under it.

**BALLOT PAPER—ABSENCE OF OFFICIAL MARK.**

In *Re Thornbury, Ackers v. Howard*, 16 Q. B. D. 739, was a case stated by Field and Day, JJ., for the opinion of the court, as to the validity of ballot papers, which conformed in other respects to the requirements of the Ballot Act, 1872 (35 and 36 Vict. c. 33), but had not on their face the official mark directed by s. 2 of that Act to be marked on both sides of the ballot paper. This section provides that "each ballot paper shall have a number printed on the back, and shall have attached a counterfoil with the same number printed on the face. At the time of voting, the ballot shall be marked on both sides with an official mark, and delivered to the voter within the polling station. . . . Any ballot paper which has not on its back the official mark . . . or on which anything, except the

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said number on the back, is written or marked, by which the voter can be identified, shall be void and not counted." The court, composed of Coleridge, C.J., and Hawkins and Mathew, JJ., were unanimously of opinion that the ballot papers were not invalid. Hawkins, J., delivered the judgment of the court, and the gist of the decision may be collected from the concluding words of his judgment, where he says :

If the Legislature had intended that the absence of the official mark from the face of the ballot paper should avoid the vote, it is impossible to suppose that in declaring in the second section what votes shall be void and not counted, it would have confined itself to the mark on the back. It would be difficult to suggest a case to which the maxim so often quoted during the argument, "*Expressio unius est exclusio alterius*," could be more justly and fittingly applied.

**MARRIED WOMAN—CRIMINAL PROCEEDINGS AGAINST HUSBAND—DEFAMATORY LIBEL.**

A further contribution to the law relating to married women is to be found in *The Queen v. Lord Mayor of London*, 16 Q. B. D. 772, in which a married woman sought to compel the Lord Mayor of London to proceed to hear and determine an application made by her for a summons against her husband for defamatory libel, alleged to have been published by him and concerning the appellant. The application was attempted to be sustained on the ground that the libel was an injury to the married woman's property, that her reputation was property; but the court (Mathew and A. L. Smith, JJ.) were unable to accede to that argument. They held that what was damaged, if anything, was the fair fame of the applicant, and that that was not "separate estate."

**VENDOR AND PURCHASER—REMISSION OF CONTRACT—MISLEADING CONDITIONS.**

In *Nottingham Patent Brick Co. v. Butler*, 16 Q. B. D. 778, the Court of Appeal affirmed the decision of Wills, J., 15 Q. B. D. 261, noted *supra*, vol. 21, p. 330.

**Writ of SUMMONS—SERVICE OF MEMBER OF FOREIGN FIRM WITHIN JURISDICTION.**

An important point of practice was determined by a Divisional Court, composed of Mathew and Smith, JJ., in *Pollexfen v. Sibson*, 16 Q. B. D. 792. The defendants were a foreign firm, and one of the members of the

firm happening to be in England on business he was served with a writ of summons in an action against the firm, which was the ordinary eight day writ. Wills, J., set aside the service as irregular; but his decision was reversed, the court holding that the rule enabling one member of a partnership to be served with a writ on behalf of his firm, applied to a foreign firm as well as an English partnership.

**WILL—CONSTRUCTION—ILLEGITIMATE CHILDREN.**

Passing now to the cases in the Chancery Division, the first to call for notice is *In re Haseldine, Grange v. Sturdy*, 31 Chy. D. 511, in which a majority of the Court of Appeal overruled Kay, J., upon a question of construction of a will and codicil. The point in controversy was whether a gift to "children" could be construed to mean illegitimate children. Kay, J., and Cotton, L.J., held that it could not, but Bowen and Fry, L.JJ., were of a different opinion. The testator, it appeared, was seized with paralysis in the house of his sister-in-law, M. A. L., and remained there until his death. M. A. L. had been married seven years but had no legitimate children; she had, however, three children by her husband born before her marriage with him, aged sixteen, thirteen and eleven, who were treated as legitimate, and with whom the testator was intimate. In October, 1860, having become worse, the testator was advised by his medical attendant to make his will, and made one containing the following dispositions: "I give and bequeath the following legacies to the following persons" (after which followed gifts of legacies to persons named) "and to each of the children of M. A. L. the sum of £5 for mourning, the same to be paid into the hands and on the receipt of M. A. L., their mother, for them, notwithstanding her coverture and their minority." On 5th August, 1881, two days before his death, he made a codicil by which he bequeathed £400 on the death of an annuitant "unto and equally between all the children who shall then be living of M. A. L., share and share alike;" and confirmed his will, except as varied by the codicil. M. A. L. was forty-four years old when the will was made. Cotton, L.J., was of opinion that the rule laid down by Lord Selborne in *Dorin v. Dorin*, 7 H. L. 568,

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577, viz., that the word "children" in a will means legitimate children, unless when the facts are ascertained and applied to the words of the will, some repugnancy or inconsistency (and not merely some violation of a moral obligation or of a probable intention) would result from so interpreting them, and that there was no repugnancy or inconsistency in confining the word "children" to legitimate children; but Bowen and Fry, L.JJ., considered that the surrounding circumstances pointed to the conclusion that the word "children" in the will and codicil was meant to include illegitimate children, and that the will would be insensible unless so construed. They also considered this construction of the will applied also to the codicil.

APPOINTMENT OF NEW TRUSTEE—DISPENSING WITH SERVICE ON CESTUI QUE TRUST.

*In re Wilson*, 31 Chy. D. 522, was an application by the persons entitled to the residuary estate of a testator to appoint new trustees of his will in place of the original trustees, one of whom had died, and the other had become a lunatic. The petition was served on three of the four persons who were entitled to the proceeds of certain real estate devised on trusts for persons who took no interest in the residue; but the fourth was resident in Australia and was not served, and service on him was dispensed with.

HUSBAND AND WIFE—SEPARATION AGREEMENT—RECONCILIATION.

In the case of *Nicol v. Nicol*, 31 Chy. D. 524, the Court of Appeal affirmed the decision of North, J., noted *ante*, vol. 21, p. 411. In this case it may be remembered husband and wife had agreed to a separation, and one part of the agreement was that the wife should be permitted the use of certain furniture. Subsequently the parties returned to cohabitation. Subsequently the wife met with a severe accident which rendered it necessary for her to be placed under medical treatment at a distance from home, and after that never returned to her husband. The present action was brought by the wife against her husband to recover possession of the furniture; but the court held that the reconciliation had put an end to the agreement, and therefore that the plaintiff could not recover.

MARRIED WOMAN—COSTS—RESTRAINT ON ANTICIPATION.

*In re Glanville, Ellis v. Johnson*, 31 Chy. D. 532, is a case in which the plaintiff, a married woman, sued by her next friend for administration of a trust fund. Upon the case coming on for further consideration it was held that the action was unnecessary, and the next friend was ordered to pay the defendant's costs. The next friend could not be found, and an application was then made by the trustees for an order authorizing them to retain such part of the costs as they could not recover from the next friend out of the income of the trust fund to which the married woman was entitled for her separate use, but without power of anticipation. Bacon, V.C., granted the application, but on appeal the Lords Justices reversed the order, holding that the effect of it was to defeat the clause against anticipation, which could not be done; but the order on appeal was, without prejudice to the trustees, applying to be paid the costs in question out of the *corpus* of the fund.

WILL—CONSTRUCTION—ILLEGITIMATE CHILD.

The hardship which occasionally results to individuals from the stringent rule of construction which prevents gifts to children being construed as gifts to those who are illegitimate, unless there is something in the will to alter the meaning of the word, is pretty well illustrated in *In re Bolton, Brown v. Bolton*, 31 Chy. D. 542. In that case the testator went through the form of marriage with J. A. C., whose husband had deserted her, and gone abroad many years before and was believed to be dead, but the testator was aware that there was no certain information of his death. By his will the testator gave to his "dear wife, J. A. B., formerly J. A. C.," certain property during her widowhood, and after her decease or remarriage he gave the *corpus* to "all and every my child or children," and in default of children to his nephews and nieces. The testator continued to cohabit with J. A. C. for more than a year and a half after the date of his will, and died leaving her *eniente* of her only child. She enjoyed the income of the property in question until her death, upon which event the nephews and nieces claimed it under the gift over, and proved that J. A. C.'s child was illegitimate, her former husband having been

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alive at the time of her marriage to the testator. It was held by the Court of Appeal (affirming Kay, J.) that the child could not take. Cotton, L.J., says at p. 551:

Assume that the testator thought it doubtful whether his marriage was void, and that the gift in his will was capable of being construed as a gift to existing children, who might or might not be legitimate, we still could not apply the gift to future children if illegitimate. *Occleston v. Fallalove*, L. R. 9 Chy. 147, was much relied on, but, in my opinion, that case does not cover this, and leaves untouched the rule that there cannot be a valid gift to a future illegitimate child described only by reference to paternity.

And Bowen, L.J., says:

A man cannot provide for the illegitimate children either of himself or of another man by any reference that involves an inquiry as to their paternity. The law allows no criterion of paternity but marriage. . . . It is true that although the fact of paternity cannot be inquired into, the reputation of paternity may. The law does not forbid that, and if we could make out from this will that the testator meant that all children of the woman born during his cohabitation with her should be considered or reputed to be his, they might take.

## ANCIENT LIGHTS—ALTERATION OF BUILDING.

*Scott v. Pope*, 31 Chy. D. 554, is a decision of the Court of Appeal on the law of ancient lights. The plaintiff was the owner of a building, on the east wall of which were various ancient lights. In 1872 the plaintiff pulled down this building and erected a new one in its place, of greater elevation and lighted by larger and more numerous windows. The east wall of the new building was advanced in one part 3 ft. 5 in., and in another part 1 ft. 7 in. nearer the defendant's building than the former wall had stood. In 1883 the defendant pulled down four old buildings immediately opposite the new buildings of the plaintiff, and began to erect houses of greater elevation on their site. No record had been kept of the exact position of the windows in the plaintiff's old building, but it was proved that the ancient lights corresponded with some part of the windows in the plaintiff's new building, and the planes of the old and corresponding new windows were very nearly but not quite parallel to one another. The plaintiff brought the action claiming an injunction to restrain

the defendant from interfering with these ancient lights. It was contended by the defendant that the alteration in the position of the windows and in the site of the wall amounted to an abandonment of the easement, but both North, J., and the Court of Appeal, held that it did not. They considered that so long as the site of the wall and the position of the new windows were such as that the light which formerly went into the old windows would go into the new, the right to the access and use of light was preserved. It having been virtually conceded in the court below that if the plaintiff was entitled to the access and use of light, he was entitled to the injunction claimed, it was held to be too late for defendant to contend in the Court of Appeal that the plaintiff was entitled to damages only, and not to an injunction.

## MORTGAGEE—FORECLOSURE—COSTS OF MORTGAGEE.

The case of *National Provincial Bank of England v. Games*, 31 Chy. D. 582, was one for foreclosure, in which the question was as to whether certain costs could be properly charged by the mortgagees against the mortgagor. By a consent order, it had been referred to the taxing master to tax the mortgagees' costs of the action, including therein any charges and expenses properly incurred by them as mortgagees, subsequently to the 6th May, 1882. The mortgage was by deposit of title deeds accompanied by a memorandum, whereby the mortgagor agreed to execute a legal mortgage. The taxing master disallowed the following charges in the mortgagees' bill. (1) Costs of an action for recovery of the debt incurred prior to 6th May, 1882. (2) Costs of correspondence with a surety for a part of the debt. (3) Costs of investigating the title with the view to procuring a legal mortgage to be executed by the mortgagor. (4) Costs of preparing a legal mortgage which the mortgagor refused to execute. (5) Correspondence with the mortgagor as to the legal mortgage. Pearson, J., held that heads (1) and (2) should have been allowed, but that the master was right in disallowing (3), (4) and (5). On appeal, however, it was held that although (1) would ordinarily be a proper charge, it could not be allowed in the present case, as it was excluded by the terms of the order direct-



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ing taxation; that (2), (4), and (5), must be allowed; but that (3) could not be allowed, as an investigation of the title was not necessary for the purpose of preparing the legal mortgage; but that the mortgagees were entitled to be allowed all expenses properly incurred with reference to the preparation of the legal mortgage, which would include the expense of such inspection of the title deeds as was necessary for preparing it.

**COVENANT TO SETTLE AFTER-ACQUIRED PROPERTY —  
VOLUNTEER NOT ENTITLED TO BENEFIT OF  
COVENANT.**

The case of *In re Anstis Chetwynd v. Morgan*, 31 Chy. D. 596, shows that the maxim, "equity looks on that as done which ought to be done," is by no means universally true, and that it cannot be invoked by a mere volunteer to avoid the effect of the non-performance of a covenant which he is not entitled to enforce.

By a marriage settlement certain personal estate was assigned to trustees upon trust, in case the husband should predecease the wife, and there should be no issue of the marriage, to stand possessed thereof, for the wife, her executors, administrators, and assigns: and the settlement contained a covenant on the part of the husband and wife, to settle any property the wife should become entitled to, upon the same trusts as the above-mentioned personal estate, or as near thereto as the nature of the property would admit of, and until so settled that it should be subject to the trusts aforesaid, and enjoyed accordingly.

By a subsequent deed certain lands were conveyed to trustees for the wife during the joint lives of herself and her husband, with restraint on anticipation, remainder to her for life, remainder as she should by deed or will appoint, and, in default of appointment, to her husband in fee. By a will made in her husband's lifetime, the wife devised these lands to two persons. The husband died in May, 1882, and the wife in the June following without republishing her will. There were no children of the marriage, and the lands above referred to were never conveyed to the trustees. The heir-at-law of the wife claimed to be entitled to the land under the settlement as against the devisees named in her will. But the Court of Appeal (affirming Bacon, V.C.) held that the wife's heir was a mere volunteer, and could

not enforce the performance of the covenant contained in the settlement, and was therefore not entitled to invoke the maxim of equity above mentioned. Lindley, L.J., who delivered the judgment of the court, though of opinion that the lands in question were within the terms of the covenant, was nevertheless of opinion that they were not actually subject to the trusts of the settlement. He says at p. 605:

Equity, no doubt, looks on that as done which ought to be done," but this rule, although usually expressed in general terms, is by no means universally true. Where the obligation to do what ought to be done is not an absolute duty, but only an obligation arising from contract, that which ought to be done, is only treated as done in favour of some person entitled to enforce the contract as against the person liable to perform it. . . . But the appellant appears to have no such right. The covenant was not entered into for his benefit in any way. He could never have enforced it against Mrs. Anstis, and her death has conferred no such right upon him. He cannot enforce any equitable right of hers, which she in effect declined to enforce herself. He has no independent rights of his own, and has no equity against her appointees. As against them he is in no better position than a volunteer, in whose favour an executory trust will not be enforced.

**APPEAL—INTERLOCUTORY ORDER—(ONT. JUD. ACT, s. 35).**

*In re Lewis, Lewis v. Williams*, 31 Chy. D. 623, is a decision of the Court of Appeal which bears on the construction of Ont. Jud. Act, s. 35, as to the meaning of the term, "interlocutory order." The action was for administration. The defendant obtained an order in Chambers directing the taxation of the costs of the plaintiff and defendant, and a creditor to whom the conduct of the action had been given, and the application of the funds in court in payment of a debt, and then *pro tanto* of the costs, and priority being given to the costs of the defendant, liberty was given to any of the parties to apply as to the getting in of an outstanding asset and generally. It was held that this was an interlocutory order.

**THIRD PARTY INTERVENING—SECURITY FOR COSTS.**

In *Appollinaris Co. v. Wilson*, 31 Chy. D. 632, an injunction had been granted restraining the defendants from parting with goods alleged to bear improperly the plaintiffs' trade mark. The defendants were carriers of the

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goods, and had no interest therein. S., a resident in America, who claimed to be the owner of the goods, served notice of motion that he might be at liberty to reship the goods to a foreign port, and that if necessary he might be added as a defendant. The plaintiffs applied for security for costs from S., which was granted by Bacon, V.C., and his order was affirmed by the Court of Appeal.

## MARRIAGE SETTLEMENT—AFTER-ACQUIRED PROPERTY.

In *re Garnett, Robinson v. Gandy*, 31 Chy. D. 648, is a case in which Kay, J., was called upon to determine whether certain property was subject to a covenant for settlement of after-acquired property contained in a marriage settlement. The settlement made in 1859 recited that the wife, amongst other property, was entitled to £10,000, part of her share of the residue of a testator's estate in the hands of the executors of the estate and secured by mortgage. This £10,000 was settled, and the settlement contained a covenant to settle after-acquired property. The day before the settlement the wife had given the executors a general release of all her claims to the testator's estate. Subsequently, in 1885, during the coverture, this release was set aside on the ground that her share was greatly in excess of that stated in the release, and the question was whether this excess, to which she became entitled on setting aside the release, was subject to the covenant to settle after-acquired property, and Kay, J., held that it was; and that not only the capital but also the income must be treated as a lump sum falling in when the release was set aside.

## EXPROPRIATION OF LAND—RIGHT OF EXPROPRIATOR TO WAY OF NECESSITY.

In *Serff v. Acton Local Board*, 31 Chy. D. 679, the defendants had expropriated under their statutory powers half an acre of the lands of A, and five acres of the lands of B for the purpose of sewage works. The only way to the land taken was a warple way over other part of A's land, which for thirty years had been used by the occupiers of both A's and B's lands for the purposes of cultivation, but latterly by A for his own use only. It was held by Pearson, J., that the defendants had a right of way over the warple way for all necessary purposes in connection with the sewage works.

## WILL—GIFT TO CHILDREN—PER STIRPES OR PER CAPITA.

The only case which remains to be considered is *In re Campbell's Trusts*, 31 Chy. D. 685, which is a decision of Pearson, J., upon the construction of a will, whereby the testator gave some houses to trustees, upon trust to receive the rents and to pay the same in equal moieties to his son and daughter during their lives; and after the death of either of them without issue living to pay the whole thereof to the survivor during the life of such survivor; but if there should be issue living of the first of them so dying, then upon trust to pay one-half to the survivor and to divide the other half between all and every the child or children of the one so dying; and after the decease of the survivor of the son and daughter on trust to sell the property and divide the proceeds equally amongst all and every, the child or children of each of them, the testator's son and daughter, who should attain twenty-one, in equal shares and proportions. The question was whether the grandchildren took *per stirpes* or *per capita*. Although at first inclined to the opinion that the division must be *per capita* the learned judge decided that the proper construction of the will called for a division *per stirpes*. He distinguished the case from *Nockolds v. Locke*, 3 K. & J. 6, on the ground that the property in that case was personalty; and he considered that the division directed, in case of one of the testator's children dying before the other, precluded the idea that the testator intended to make a different division when the survivor should die.

## SELECTIONS.

## SELECTIONS.

## CRIMINAL EQUITY.

Unless the criminal law is to be allowed to sink into a state of unintelligibility, one of two things must occur. We must either have a Criminal Code, or we must have a more efficient Court of Criminal Appeal. The code of Mr. Justice Stephen, admirable example as it is of learning and logical skill, and carefully revised as it was by experienced judges, is very far from inspiring sufficient confidence to make its adoption possible. It has a tendency to break down in practice, as witness the recent case of *Regina v. Hyndman*, when the code said one thing as to the law of sedition and the Digest of its chief author another thing. The inefficiency of the Court for the Consideration of Crown Cases Reserved is due in no way to any shortcomings on the part of the judges who compose it, but to the nature of its constitution. No one who reads the judgments in *Regina v. Ashwell*, 55 Law J. Rep. M. C. 65 (reported in the May number of the *Law Journal Reports*), but will be struck with admiration at the learning, ingenuity, and dialectical power of the judges who delivered them. Each judgment is an essay in itself. The fault of them is, however, that they are wanting in practical character. The Court for the Consideration of Crown Cases Reserved consists of twenty-three judges, of whom fourteen sat on this occasion, but five of whom, varying from time to time, usually sit, and it necessarily wants cohesion. When the Court sits in full numbers there are too many judges to arrive at one conclusion; and when it sits in diminished numbers its decision will be overhauled, probably with the mischievous result of "distinguishing" on the next occasion by five fresh judges. The want of responsibility which results is the cause of the purely academic character of the judgments delivered. They are most interesting as embodying the varying opinions of judges, but any responsibility for mak-

ing the criminal law work is entirely absent. We want a Court into which this sense of responsibility may be instilled, and probably we cannot do better than adopt the existing system of appeal in civil cases. If the Court of Appeal and the House of Lords are not capable of deciding what is and what is not larceny they are certainly not capable of deciding the much more intricate questions of civil liability which come before them; and that depth and width of knowledge of law which a Court of Appeal ought to possess cannot be reached by judges not thoroughly acquainted with the law of crime. What is required is a Court of Criminal Appeal which will lay down boldly the few essential principles of criminal law and not deviate from them.

Readers of the judgments of the Lord Chief Justice and Mr. Justice Cave in *Regina v. Ashwell* will rub their eyes and doubt whether they can really be reading a judgment in a criminal case. If there is one branch of law more than another in which facts ought to be dealt with boldly and even coarsely, it is the law of crime. The question was whether when the prosecutor handed Ashwell something, and Ashwell took it, there was a giving and receiving. If so, there was an end of the charge, because both the prosecutor and Ashwell thought at that time they were passing a shilling from one to the other. The thing passed was, in fact, a sovereign, but as Ashwell did not find this out until an hour afterwards, his misappropriation of it then would be no crime, because he could not steal what was already in his possession. Lord Coleridge says: "It seems to me very plain that delivery and receipt are acts into which mental intention enters, and that there is not in law, any more than in sense, a delivery and receipt unless the giver and the receiver intend to give respectively what is respectively given and received." However sound this may be as a philosophical disquisition, is it applicable to the elucidation of the law of crime? According to this view, if a schoolboy put a toad in his sister's apron on pretence of its being an india-rubber ball, there is no receipt of the toad, yet there is a scream from the sister all the same. But Lord Coleridge modifies his proposition in his next sentence, in which he says that "all acts to carry legal conse-

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quences must be acts of the mind," which he hopes is not "laying down anything broad or loose." With all respect, it seems neither broad nor loose, but wrong, as some familiar examples of criminal law show. A., who shoots at B. and kills D., is guilty of murder; if he steals B.'s watch to spite D., he is guilty of larceny. If he fire a gun into a street, meaning to discharge it, and kill a passer-by, he is guilty of manslaughter, or perhaps murder. These and numerous other examples seem to show the practical nature of the law of crime, and how little it looks at the metaphysical fact.

Lord Coleridge further fears that "to hold that a man did in law what he did not know he was doing, and did not intend to do, is to expose the law to very just, but wholly unnecessary, ridicule and scorn." It is unnecessary that lawyers should appeal to any such exoteric test of their principles. They can afford to despise the ridicule and scorn of all but those who understand the subject. Lord Coleridge's judgment follows with an argument of Mr. Justice Stephen turned against himself with a neatness which controversialists will admire. "It seems to me," says the Chief Justice, "with diffidence, that he creates the fiction who holds the man does what he does not know he does and does not mean to do, not he who says that an act done by an intelligent being is not an act of that being unless it is an act of his intelligence." In other words, a man who walks in his sleep does not walk at all, and it is a fiction to say that he does, and the fact to say that he does not. Mr. Justice Cave puts his decision on the ground that by reason of the coin being a sovereign, and not, as both supposed, a shilling, the possession of the sovereign did not pass, and the prisoner took it when he found out that it was a sovereign. He says, "A man has not possession of that of the existence of which he is unaware;" but this definition does not carry the learned judge to his conclusion. Ashwell was aware that the prosecutor had given him a coin; what he did not know was that the coin was gold and stamped as a sovereign. Suppose a warehouseman receives a picture as a copy of a great master, and it is lost by his negligence, could he be by proving at the trial that the picture was an original show that he never in law had possession at all? Mr. Justice Cave

asks, "Suppose that, while still ignorant that the coin was a sovereign, he had given it away to a third person, who had misappropriated it, could he have been made responsible to the prosecutor for 20s.? In my judgment he could not." Probably Mr. Justice Cave is right. If a man gives another man what he describes as a paste necklace to take care of, he cannot recover its value as genuine on proof of the fact. But this also does not go far enough. Mr. Justice Cave must say that the prosecutor under those circumstances could not recover the shilling. This, he admits, he could recover, and therefore the possession of something passed, and not of nothing. The robust view expressed by Mr. Justice Smith will meet with better acceptance. The learned judge says: "In the present case it seems to me in the first place that the coin was not taken against the will of the owner, and, if this is so, in my judgment it is sufficient to show that there was no larceny at common law." In this we agree, although we are surprised to find Mr. Justice Smith further on agreeing with the *dictum* in *Regina v. Middleton*, 42 Law J. Rep. M. C. 73, that a cabman who is given a sovereign in mistake for a shilling, and who takes it knowing the mistake, is guilty of larceny. This opinion is inconsistent with Mr. Justice Smith's view, previously expressed, that if the coin was not taken against the will of the owner there is no larceny.

The statement of Mr. Justice Smith, that he was fully alive to the remark which had been made, that if the present case is not one of larceny it should be, supplies the key to the decision. This is the very argument which most impresses a bench of judges constituted like the Court of Crown Cases. The general assembly of the judges produces a deliberative and legislative body rather than a Court of law. A body of this kind is very likely to be sensitive to influences from without, and to consider what will be thought of their decision by the public rather than to lay down the law. They feel too many and too strong to resist the temptation of bending the law according to the dictates of common sense. In other words, they become a Star Chamber, which, as Mr. Justice Stephen points out in his learned judgment, decided "according to

## SELECTIONS.

the law of nature in Chancery." Some strange results followed when this unlucky law of nature found itself "in Chancery"; but the Star Chamber had its advantages in days when powerful and lawless men could not be reached by ordinary law. It was the necessary machinery for their coercion. When, however, advances were made in civilization, the Star Chamber became unalloyed tyranny, and is now universally stigmatized in history. The "criminal equity" which it used to administer does not, however, seem to have died out altogether. Chief Baron Pollock used to say that "criminal equity" died out with the Star Chamber, but he did not see the recent development of the Court for the Consideration of Crown Cases Reserved. In *Regina v. Middleton*, with the dissent of Barons Martin and Bramwell, the present Master of the Rolls and Baron Cleasby, the doctrine that larceny must be *invito domino* seems to have been struck out of the law; in *Regina v. Ashwell* a similar fate seems to have attended the doctrine that there must be a felonious taking, not, as in the other case, by a majority of the judges, but in virtue of the phrase, *Semper presumitur pro negante*. It is a characteristic example of this Court that this rule is not construed in its substantial sense—namely, that the crime was negated—but in the artificial sense that the motion to quash the conviction was rejected.—*The Law Journal* (London, Eng.).

## SELF-DEFENCE.

In a recent case in Iowa \* the Supreme Court takes what is believed by some gentlemen of the bar in that State to be a new departure on the law of self-defence, and the duty of a person assailed to "retreat to the wall," before taking human life. In that case the prisoner was pursued by the deceased (who was his father), armed with a pitchfork, very angry, and apparently intent upon serious mischief. Without exhausting his remedy of flight, the prisoner turned upon his pursuer and shot him, and he died two days afterwards. The prisoner was convicted of manslaughter, and sentenced to imprisonment

for fifteen years. In the trial Court, the judge charged the jury thus: "You are instructed that it is a general rule of law that, where one is assaulted by another, it is the duty of the person thus assaulted to retire to what is termed in the law a wall or ditch, before he is justified, in repelling such assault, in taking the life of his assailant. But cases frequently arise where an assault is made with a dangerous or deadly weapon, and in so fierce a manner as not to allow the person thus assaulted to retire without manifest danger of his life or great bodily injury; in such cases he is not required to retreat." This instruction, the Supreme Court held, stated the law on the subject correctly.

For the defence it was argued that the instruction was erroneous in holding that the assailed is bound to retreat, and is only exempt from the necessity of doing so, where it would be manifestly dangerous to attempt a retreat. It was insisted that the assailed is only bound to retreat where the assault is not felonious. Where it is felonious the assailed may well stand his ground and kill his assailant, if he has reasonable grounds as a prudent man for believing that if he does not, his assailant will kill him. And this under these circumstances, he may well do, irrespective of his means of escape by flight.

This line of defence the Supreme Court held was untenable, and, as we learn from a correspondent, the opinion of the profession in Iowa is divided on the subject.

If the time-honoured doctrine which requires a retreat to the wall is limited to non-felonious assaults, as seems to be argued against the reasoning of the Court, there are comparatively very few cases in which retreat can be required at all. The question can seldom arise except in cases which our statutes denominate "assaults to kill." In an ordinary affray or "fisticuff" the assault is not felonious, and in those cases the danger to life or of great bodily harm does not usually exist, and these are as essential to a successful defence as the retreat to the wall. Mr. Bishop says: "The cases in which this doctrine of retreating to the wall is commonly invoked are those of mutual combat. Both parties being in the wrong, neither can right himself except by retreating to the wall. Where one, contrary to his original expectation, finds himself so hotly pressed as to render the killing of

\* *State v. Donnelly*, 27 N. W. Rep. 369.

the other necessary to save his own life, he is guilty of felonious homicide if he kills him, unless he first actually puts into exercise this duty of withdrawing from the place."<sup>†</sup>

An assault may not be in the first instance felonious, but if in the heat of the affray there arises danger to the life of either of the parties, it can hardly be possible that there shall not exist in one or the other, or both of them, a felonious design to kill and murder. And the very law that requires the retreat to the wall recognizes the existence of such danger and of such design as a condition precedent to the retreat to the wall and its subsequent fatal result. Unless a man engaged in an affray is in danger of his life, or of great bodily harm, he has no right to kill his adversary, either before or after retreating to the wall. And therefore, as it is in all cases necessary, in order to excuse a homicide *after* a retreat to the wall, to show that the prisoner was, or believed he was, in serious danger from his adversary, it follows that that adversary must have been in the act of committing a crime, the equivalent of the statutory assault to kill, which is felonious.

The argument against the ruling of the Court is based upon the idea that when one is attempting to commit a felony, it is justifiable to prevent it by taking the felon's life, if that is the only mode in which the perpetration of the crime can be prevented. This, it may be observed, is merely arguing in a circle, for if the intended felony of the elder Donnelly could have been prevented by the flight of the younger, the death of the former at the hands of the latter could not be excused even upon this principle. We think that the Supreme Court of Iowa decided this case correctly, for we believe that the true rule is that to excuse a homicide on the ground of self-defence the party must, if he could with safety, have retreated to the wall, and that the only exception to the rule is that when a man is assailed in his own house he is under no obligation to retreat at all.†—*The Central Law Journal.*

## NOTES OF CANADIAN CASES.

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### CHANCERY DIVISION.

Proudfoot, J.]

[April 20.]

COOK v. NOBLE.

*Will—Devise—Legacy—Maintenance to widow and family—Abatement of legacies.*

A testator gave to his executors and trustees, of whom his wife was one, all his real and personal estate, with a direction to convert his personal estate into money, pay debts and invest balance. He directed them to pay his wife from time to time such money as might be sufficient to support, maintain and educate his family, and to maintain his wife in a manner suited to their condition in life, and for that purpose gave his wife power to collect money, and to take therefrom enough to maintain his family and herself. And he directed his sons to pay her \$150 a year after they received their lands, charging it on the lands, but they were not to pay it so long as she and the family were maintained out of the estate. The trustees were to pay \$1,000 to each of the daughters as they attained twenty-one, and if there was not sufficient personal estate to pay them the balance was to be a charge on the real estate; the real estate was to be divided between the sons when the eldest attained twenty-five; and then the trustees were to give him \$2,000. The balance of the personal estate was to be divided between the sons, the eldest being charged with his \$2,000.

*Held*, that the children were only entitled to maintenance until they attained their majorities.

*Held*, also, that the widow was entitled to maintenance until the provision as to the \$150 came into operation, which would be when the

<sup>†</sup> Bish. Cr. Law, § 870; citing Foster, 227; State v. Hill, 1 Dev. & Batt. 491; Stoffer v. State, 15 Ohio St. 47; State v. Howell, 9 Ired. 485.

<sup>†</sup> On this subject see: People v. Sullivan, 7 N. Y. 396; Maxwell v. State, 22 Ga. 211; Lyon v. State, Ibid, 399; Cotten v. State, 31 Miss. 504; People v. Hurley, 8 Cal. 390; State v. Thompson, 9 Iowa, 108; United States v. Mingo, 2 Curtis, 1.

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sons respectively attained twenty-five. Although the maintenance was to be made from the personal estate, and no part of the rents were assigned for that purpose, as the devisees of the real estate were not entitled until they attained twenty-five, the intermediate rents, not being disposed of descended to the heirs-at-law, *i.e.*, the children, and might be applied for their maintenance if the personal estate was insufficient.

When a testator has himself specified the time for the duration of maintenance that will be observed; but the right to maintenance and support when given in general terms will cease with the marriage or forisfiliation of a child, *Knapp v. Noyes*, Amb. 661; *Gardiner v. Barber*, 18 Jur. 508, and *Wilkins v. Jordrell*, 13 Ch. D. 564, considered and commented on.

A widow ceases to be entitled to support and maintenance upon marrying again.

*Query*, as to her rights if she should again become a widow without means of support.

*Held*, if the \$2,000 legacy to the son absorbs all the personal estate the daughters get none of it, as their legacies are charged on the land, and that the \$2,000 legacy and the legacy for maintenance must abate proportionately.

*Moss*, Q.C., and *McPhillips*, for the plaintiffs.

*MacLennan*, Q.C., for the infant defendants.

*Cassels*, Q.C., and *Holland*, for the adult defendants.

Proudfoot, J.]

[April 28.]

REGINA EX REL. FELITZ V. HOWLAND.

*Contempt of Court—Publication of letter by solicitor pending appeal—Time at which offence to be considered—Right of a relator to make the motion—Apology—Costs.*

A judgment was delivered by the Master in Chambers on a *quo warranto* proceeding on March 23rd, 1886, and an article referring to it was published in *The Mail* newspaper on the next day. On March 26th, the solicitor for the defendant gave notice of appeal against the judgment, and on the same day wrote a letter in answer to the article commenting on the judgment of the Master in reference to the case, which letter was published in *The Mail* next day.

On a motion made by F., the relator, to commit the solicitor for contempt, notice of which was given on the same day as notice of the abandonment of the appeal, it was

*Held*, that the nature of the charge against the solicitor must be determined as at the time of the publication of the letter, and could not be affected by the fact of the abandonment of the appeal on the same day that the notice for the motion to commit was given; that the solicitor could not take advantage of his double character of citizen and solicitor; that it was not allowable for a solicitor engaged in a cause to comment in the press on it while pending; that the relator in the *quo warranto* proceeding had a right to make the application; that the letter was not only an injudicious but an improper one, and was a contempt of Court. An affidavit was put in and read on the argument, containing an explanation by the solicitor which was coupled with statements by his counsel as to the character, ability and conscientiousness of the Master, and a denial of any intention to impugn any of these.

*Held*, that as the appeal had been abandoned and no prejudice could now arise to the applicant, a proper disposition of the case would be to refuse the motion, which was done, but upon payment of the costs by the solicitor.

*Bain*, Q.C., for the motion.

*S. H. Blake*, Q.C., contra.

An appeal from this judgment is now pending in the Court of Appeal.

Proudfoot, J.]

[April 28.]

GORDON V. GORDON.

*Will—Power to sell—Power to mortgage—Estate getting the benefit of unauthorized loan—Position of mortgagees.*

A testator by her will devised and bequeathed all the rest and residue of her real and personal estate unto R. G., and his heirs, executors, administrators, and assigns, "upon trust to sell the real estate, and to call in and convert into money the remainder of the personal estate, with power to demise or lease any portion for any term or terms of years," and

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out of the moneys arising from such sale to pay off a certain encumbrance existing on the property, and divide the balance among the four children.

*Held*, that the above words did not confer upon R. G. a power to mortgage the property, but that he having, as a matter of fact, mortgaged a portion of the said residuary estate, and applied the proceeds of the loan for the benefit of the estate, the mortgagee was entitled to claim against the estate, but he could only rank after certain encumbrances placed by specific devisees upon the property specifically devised to them.

*Clute*, for the executors of Patrick Turley, mortgagee.

*Neville*, for R. Gordon, the executor.

*J. Hoskin, Q.C., E. D. Armour, and Kapfjele*, for other of the parties.

Boyd, C.]

[May 13.]

# WALLIS V. SCHOOL TRUSTEES OF LOBO.

*New school section—Selection of school site—Change of same—Necessary requisites under 48 Vict. c. 49, s. 64—Costs.*

A new rural school section being formed, it became necessary for the three trustees to provide a school site, etc. A public meeting of the ratepayers was called pursuant to 48 Vict. c. 49, s. 64, which nearly all the ratepayers attended, when the T. L. site was chosen by a majority vote of both the ratepayers and trustees as against the J. C. site.

A complaint against this result was lodged with the School Inspector under s. 32 of the statute, which led to his making attempts to have an amicable adjustment of the difficulty, the outcome of which was that two of the trustees gave notice of a subsequent meeting for the purpose of changing and selecting a school site, at which meeting a unanimous vote was had in favour of a third site called the C. site.

In an action by the other trustee and some ratepayers to have it declared that the last meeting was illegal, and to restrain building on the C. site, in which it appeared in evidence that fifty out of the sixty-seven ratepayers approved of the latter site, it was

*Held*, that the necessary precaution, under sec. 64 of the statute, of taking the opinion of the ratepayers was complied with, and the selection made was the T. L. site; that no change of a school site should be made without the consent of the majority of ratepayers present at a special meeting called for that purpose, and that under the circumstances of this case the school site had been ascertained and fixed by the first meeting, but it was competent for the second meeting to change this site with the consent of the necessary majority. The whole tendency of recent amendment of the Education Acts has been to give the rural school sections greater powers of self-regulation and self-government, and the Courts should not be astute to interfere, unless there has been a plain violation of the statute or a manifest usurpation of jurisdiction, or a reckless disregard of individual rights.

The action was therefore dismissed, but without costs, as it was a new point, and the statute was not plainly expressed.

*Hellmuth*, for the plaintiffs.

*T. Meredith*, for the defendants.

Galt, J.]

[May 16.]

# CAREY V. GOSS.

*Trade mark—Infringement—Injunction—Registration of trade mark—Registration of assignment—Trade Mark and Design Act of 1879—42 Vict. c. 22, s. 4 & 14 (D.).*

The L. F. P. Co. published a newspaper called *The Commercial Traveller and Mercantile Journal*, which would be known as *The Commercial Traveller*, as those words were printed in much larger letters than the words "and Mercantile Journal," and registered it under the Trade Mark and Design Act, 1879, as *The Commercial Traveller's Journal*. The company sold the paper and good-will to the plaintiff, and on the negotiations for the sale the plaintiff saw the defendant, who was then employed by the company as manager and editor, and who showed him the assets of the paper, the printing contracts, etc., and recommended the purchase as a good investment.

After the sale, the defendant who had retained a mail list of the subscribers to the



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paper published a new paper, called *The Traveller*, and used the list to send copies of his paper to some of the names contained therein. It was shown in evidence that while the defendant was in the employ of the company he often used the word "Traveller" as designating the paper then known as *The Commercial Traveller*. In an action to restrain the defendant from infringing the plaintiff's trade mark, it was

*Held*, that the title of the paper published by the defendant was an infringement of the trade mark of the plaintiff, and that the subsequent publication by the defendant of a newspaper under the name of *The Traveller* was calculated to mislead persons and induce them to believe the plaintiff's paper was the paper referred to.

*Held*, also, that although the 4th section of the Trade Mark and Design Act of 1879, 42 Vict. c. 22 (D.), requires registration of the trade mark before the proprietor can bring an action, and the 14th section provides for registration of an assignment, still the latter section does not enact that registration shall be necessary to give effect to such assignment.

An injunction was therefore granted.

*Foy, Q.C.*, for the plaintiff.

*Morson*, for the defendant.

#### PRACTICE.

Proudfoot, J.]

[April 12.]

MOORE V. MOORE ET AL.

*Dower—Pleading and practice—Ont. Jud. Act—Dower Procedure Act.*

The writ of summons was indorsed under the O. J. A. with a claim for dower and arrears of dower. The defendants entered an appearance, but added to it an acknowledgment of the plaintiff's right to dower, and a consent to her taking proceedings to have the same assigned to her under the Dower Procedure Act, R. S. O. ch. 55. The plaintiff delivered a statement of claim, taking no notice in it of the acknowledgment and consent, and claiming dower and arrears.

*Held*, that it was necessary for the plaintiff to deliver a statement of claim in order to re-

cover her dower, and she could not, having elected to institute proceedings under the O. J. A., be compelled to take any steps under the Dower Act.

*Hoyles*, for the plaintiff.

*Rae and Holman*, for the defendants.

Boyd, C.]

[May 5.]

THOMPSON V. FAIRBAIRN ET AL.

*Executors' compensation—Administration order—Responsibility of executors—Charging executors with interest.*

Executors claimed compensation in respect of collections amounting to \$29,000, and of disbursements amounting to \$5,000. All the work of collecting and paying over was done after an order for administration had been made, and was done under the advice of solicitors, and in the more important matters under the direction of the Master. An item introduced on each side of the account was a transfer of mortgage to the plaintiff amounting to \$4,684.47, which was carried out in pursuance of an arrangement made by the solicitors and sanctioned by the Master. It also appeared that the plaintiff's solicitor collected and handed over to the executors \$2,400, and also made a payment to them of \$10,000 for which he was personally liable.

*Held*, that although the administration order did not put an end to the functions of the executors, yet it greatly diminished their responsibility, and it did so in this case to an almost vanishing point; and the compensation was reduced to \$440, nothing being allowed in respect of the item of \$4,684.47, one per cent in respect of the items of \$2,400 and \$10,000 two and a half per cent. on the balance of the collections, and five per cent. on the disbursements except the transfer.

The executors retained in their hands a sum of \$1,100 to meet claims against the estate and were not called upon to pay it into Court.

*Held*, that the amount retained was not unreasonable, and that the executors were not chargeable with interest in respect of it.

*W. H. C. Kerr*, for the plaintiff.

*Hoyles*, for the executors.

## REVIEWS.

## REVIEWS.

## LAWS OF INTESTACY OF THE DOMINION OF CANADA.

By J. Armstrong, Q.C., C.M.G., late Chief Justice, St. Lucia, W.I. Montreal: John Lovell & Son, 1885.

We owe an apology to the author of this pamphlet for not noticing it before now. He has done good service in drawing attention to the state of the law of intestacy in the different Provinces of the Dominion. The writer in his introduction quotes approvingly comments made in this journal at different times on the same subject. It will be a surprise to some to be told that the law of intestacy is not the same in any two of the Provinces; and should he desire to see a careful comparison, he cannot do better than examine the excellent summary of these various laws as given in this pamphlet.

It is a matter of more than passing interest to realize the differences referred to. The various sections of this Dominion ought to be growing together. As far as the Province of Quebec is concerned, the grievous error of past days in allowing that Province to retain its peculiar laws and language, thus perpetuating a disturbing influence, cannot easily be rectified, but in the other Provinces a step towards assimilation in the matter referred to would be a move in the right direction.

THE TORRENS SYSTEM OF TRANSFER OF LAND. A practical treatise on the Land Titles Act of 1885, Ontario, and the Real Property Act of 1885, Manitoba, by Herbert C. Jones, Esq., of Osgoode Hall, Barrister, etc. Toronto: Carswell & Co., 26 and 28 Adelaide St. East, 1886.

We can understand how Sir R. R. Torrens, familiar with the very expensive and tedious practice affecting land transfer in England, applied himself to remodelling the mode of declaring title and the transferring of land in Australia, where there was a clean sheet to begin on. In this country the evils have been of no great proportions, and we have not felt very much exercised on the subject. The Torrens system was taken up in this country originally, by persons interested in large companies loaning money on land, doubtless with the thought of facilitating the mortgaging and sale of properties. So far as the Legislature was concerned, it was only natural that it should take a fatherly interest in a system which, at least, appealed to the masses as one likely to save delay and expense

in the sale and transfer of landed property. So far as lawyers are concerned, especially in country places, the Act will not affect them to any great extent, as conveyancing is no longer a distinctive feature of professional business. The question as to whether it is after all desirable that as great facilities should be given to the transfer of land as to the transfer of chattels was not, so far as we remember, discussed; the scheme was popular, and that was sufficient to ensure its immediate adoption. It is scarcely worth while to discuss the question now, but weighty arguments could, we think, be adduced to show that these great facilities are not entirely without serious objection.

So far, no great amount of work has devolved upon the officers appointed to work the Act; but as there is at present some activity in "corner lots" in the neighbourhood of Toronto and a few other cities, the Act will be invoked as an inducement to attract purchasers to properties, which have been bought on speculation for the purpose of being divided into small lots.

The book before us can scarcely be said to be a "practical treatise"; though this is, perhaps, not so much the author's fault as that of the fact that so far there is no practice to refer to, and it would be no light task to imagine or suggest, and then meet, the difficulties that will, we presume, crop up as well in the working of this Act as they have done in all others of a like character. There is much matter given which is of historical interest, and there are appropriate references to various statutes and annotations on similar acts in Australia and elsewhere, as well as to the few cases that have so far been decided under them.

Our author falls foul of the law of dower as something which should be done away with in Ontario, as it has been in Manitoba. In this we agree with him. We cannot, however, for reasons which will be obvious when we state that we write in the "bosom of our family," to say nothing of having drawn a prize, agree with him in the following remarks which we find on p. 138:

"Marriage is a lottery. The man is generally 'taken in,' and is like the fish that swallows the silver trolling spoon. When caught the fish finds he has been fooled, and that he is lying in the bottom of an old boat instead of being free in the St. Lawrence. The man that is fooled in the matrimonial market finds that all his real property is subject to a lien of one-third for dower, and he has to support his wife, or else be called before the police magistrate, and an inquisition entered into to find out why; and that his wife can have all the property she had when married, and all she acquires after, and can dispose of it as she pleases, and so far as the 'purposes of this act' are concerned, is a *feme sole*. No wonder there are so few marriages in Toronto."

This is very sad.

## FLOTSAM AND JETSAM.

## FLOTSAM AND JETSAM.

**THE ROMANCE OF THE WOOLSACK.**—The "opportunity" that made Mr. Herschell was one of those rare and remarkable chances that occur in the legal profession. An old woman had been brutally murdered in her cottage on the road between Liverpool and St. Helens. A tramp was arrested by the police at the Old Swan, and was committed for trial on the capital charge. The case came on at the Crown Court, St. George's Hall, before the late Chief Justice Bovill. When the prisoner was placed in the dock and arraigned he said that he was undefended. There were only about four barristers in the court, of whom Mr. Herschell was one. The judge asked him to undertake the defence. The young lawyer cross-examined the witnesses—the evidence being purely circumstantial—with much acuteness; in dealing with the doctor's testimony he displayed considerable scientific knowledge; and his speech for the defence was remarkable for its eloquence and power. The result was that the prisoner was acquitted, and Chief Justice Bovill paid a high compliment to Mr. Herschell for his talent in conducting a defence under circumstances of exceptional difficulty. The result of the trial caused a great sensation throughout Lancashire. The fame of the young lawyer, to whose brilliant advocacy was mainly attributable the prisoner's acquittal, spread far and wide, and from that time briefs, both in civil and criminal cases, were freely sent to him.—*Liverpool Courier*.

**TELEPHONE TESTIMONY.**—All our "modern improvements," railroads, telegraphs, gas-light, electric lights, etc., produce much litigation, and bring before the courts new principles, or more properly, perhaps, the application of old principles of law to new conditions and circumstances. The railroad more particularly has been a most fruitful source of litigation. One can hardly open a modern book of reports without encountering the familiar abbreviation, "R. R. Co.," and our old acquaintances "negligence," and "contributory negligence." The telegraph, too, has done something, but very much less, in furnishing business to lawyers, and employment to courts, but the

telephone is as yet behind and has evolved very few legal questions. It is young yet, and in due time will, no doubt, do better.

A rather singular case occurred a few days ago in a  *nisi prius* court in this city, which brought up the question, whether a communication by telephone was admissible in evidence, the person receiving the communication not being able to recognize the voice of his interlocutor, nor identify him otherwise than by the fact that he had called up A. B., and that the party at the other end of the line stated that he was A. B. The "Central" official was not called to prove that he had put the two numbers into communication, and the testimony of the witness amounted simply to this: that he had heard somebody whom he did not recognize, say that he was A. B., and that he accepted the proposition made by the witness. The question was, is such testimony competent as tending to prove that A. B. by the response to the telephonic inquiry, incurred a civil liability? The court permitted it to go to the jury "for what it was worth."

The only case which as yet we have been able to find, was decided by the Supreme Court of Kentucky.\* The facts were that A., desiring to talk over the telephone with B., asked the operator to call him. At A.'s request the operator conferred with B. by telephone and reported to A. what B. said. Upon being called as a witness, the operator could not remember what B. said, but the court admitted the testimony of A. and bystanders as to what the operator said that B. said; the trial court held that the testimony was competent.

Upon appeal the Supreme Court took the same view, regarding the operator in the light of an interpreter, who has been held to be, for the purposes of his function, as the agent of both parties, and his declarations of what was said by them are admissible in evidence.†

\* *Sullivan v. Kuykendall*, 24 Am. Law Reg. 442.

† *Camerlin v. Palmer*, 10 Allen 339; *Scheerer v. Harper*, 36 Ind. 536; 1 Greenl. Ev. § 163; 1 Phillips Ev. 319.

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## DIARY FOR JUNE.

- 1. Fri....Battle of Waterloo, 1815.
- 1. Sat....C. C. York term ends.
- 2. Sun....Trinity Sunday. Accession of Queen Victoria, 1837.
- 2. Tue....Longest day. Slavery declared contrary to law of England, 1772.
- 2. Thur....John and Sebastian Cabot discover Canada.
- 2. Fri....First Sunday after Trinity.
- 3. Mon....Coronation of Queen Victoria, 1838.
- 3. Wed....Acquittal of the seven bishops, 1688.

TORONTO. JUNE 15, 1886.

We have received a communication from a member of the profession, in which, after expressing regret at the sudden and radical changes which are being introduced into our law, and that important measures are hastened through our Legislature with so little care as to details, he goes on to advert to the new "Lands Title Act" of 1885, remarking that with its code of rules it is a measure with much of resemblance to the "Judicature Act" and likely to give fully as much trouble. He then quotes the passage with reference to flower and matrimony, referred to by us in our review of Mr. Jones' edition in a recent issue, and adds, "I need scarcely point out that this result could not have been contemplated by the framers of the Act. All the 'spooning' must henceforth be done by the ladies, and even then the wary fish will not often take. He is under the Torrens System, and feels himself, so to speak, estopped by law. At all events he knows that in endeavouring to steer clear of bachelorhood he will almost inevitably be swamped in the abyss of matrimony. Under our present law the only property which a man has in his wife is an imaginary property. I think the following amendment would not only obviate the above difficulty, but would be

the means of insuring the success and renown of the Act: 'A married woman shall, from the date of this Act, be deemed the *real* property of her husband.' " We consider this a very able suggestion. It would get rid of much embarrassment, and since, notwithstanding the best efforts of radical reformers, the great majority of faithful spouses would not object to the clause, why should it not be adopted by our enlightened Legislature? We think, however, that Mr. Jones and our correspondent somewhat exaggerate the effects of legislation on matrimony.

How small a part of all that men endure  
The part that kings or laws can cause or cure.

We have not time to turn up the quotation, and are not sure that we have it correct, but Mr. Jones will appreciate its applicability. Disunionists may do their best or worst, but matrimony will continue in most cases to be a united kingdom, though woman may be queen.

SOME time since we expressed the hope that the grounds at Osgoode Hall might be made somewhat more attractive by the cultivation of flowers to a greater extent than has been previously attempted. We are glad to find that our suggestions have this year been adopted by the Benchers, that additional flower beds have been added, which bid fair to lend a newer charm to our already beautiful oasis on Queen Street. Still further we have to congratulate the juniors of the profession for having secured the permission of the Benchers to use the west lawn for tennis. This is a thing we also urged, and might very properly be allowed by the authorities, and we are glad to see that it has been.

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THE SORT OF A JUDGE WE WOULD BE, ETC.—SUMMARY PROCEEDINGS BEFORE JUSTICES.

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THE Osgoode Hall Lawn Tennis Club has been formed. All barristers, solicitors, articled clerks, law students, and officials employed in the Courts at Osgoode Hall are, we understand, eligible as members. Mr. Christopher Robinson, Q.C., worthily fills the part of Honorary President, Mr. Beverly Jones discharging the more onerous position of the working President. The club have had four courts laid out, and on Saturday, the 12th June, the grounds were opened for play, and presented quite an animated appearance. If the members of the club do not permit their attendance at the four courts outside the hall to interfere with their duties before the Courts within, and are careful not to abuse in any other way the privilege which has been accorded them, we think it will be found that the Benchers have done wisely in permitting the grounds to be thus used; and the healthful amusement of a game of tennis when the day's work is over will often prove a welcome relaxation to men tired of the dull routine of taxing costs, arguing Chamber motions, filing papers, etc., etc.; and any little irregularities which have proved a source of irritation in the course of business may be pleasantly smoothed over in a friendly contest in which no more hurtful weapon is employed than a tennis racquet.

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THE SORT OF JUDGE WE WOULD  
BE IF WE WERE A JUDGE.

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*Quis custodiet ipsos custodes.*

1. WE would carefully abstain from giving judgment before we had heard the arguments.

2. We would pay the same patient attention to the argument of the youngest counsel as to that of the leader of the bar, or possibly more, as knowing that the former would necessarily be under

certain disadvantages in giving expression to the points which he desired to make.

3. We would never forget that irritability and impatience on the bench are, of all things, most detrimental to the administration of justice.

4. We would likewise never forget that behind the counsel addressing the Court are clients who are the individuals really interested in the matters in question.

5. We would always remember that we were appointed to our high office because we were supposed to possess a special knowledge of the law as laid down in the books, and not because we were supposed to have a more acute moral sense than the rest of our fellowmen.

6. We would fully recognize the fact that every litigant has a positive right to have his case decided according to the rules of law, so far as they have been determined, and that we are bound by our oath of office to accord to him that right, and not to give way to our individual susceptibilities or the view we may personally take of the moral equities of the case before us—except, possibly, in the matter of costs.

7. We would, in fact, ever remember that we were a judicial officer, and not a lay-arbitrator.

8. We would carefully note all the points taken by counsel, and give them one by one a conscientious consideration.

That is the sort of a judge we would be, and we should, of course, expect an adequate salary.

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SUMMARY PROCEEDINGS BEFORE  
JUSTICES.

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WE have already referred to this very beneficial legislation, completed at this session of the Dominion Parliament, having reproduced some of the observations of the learned senator (Hon. Mr. Gowan)

## SUMMARY PROCEEDINGS BEFORE JUSTICES.

who introduced the measure, at the time of the second reading of the bill. This bill has now become law, and it is fitting that it should again be referred to, as it makes some very important changes in the law, and is a carefully drawn and workmanlike enactment prepared by one who has had an immense experience in such matters.

The first section defines what is meant by the words "justice of the peace." The second provides that no conviction or order made by any justice of the peace, and no warrant for enforcing the same, shall, on being removed by *certiorari*, be held invalid for any irregularity, informality or insufficiency therein; Provided, that the Court or judge before which or whom the question is raised is, upon perusal of the depositions, satisfied that an offence of the nature described in the conviction, order or warrant, has been committed, over which such justice has jurisdiction, and that the punishment imposed is not in excess of that which might have been lawfully imposed for the said offence; and any statement which, under this Act or otherwise, would be sufficient if contained in a conviction shall also be sufficient if contained in an information, summons, order or warrant.

As explained by the learned author of the Act, the anomaly has hitherto existed that the Courts of Session—inferior Courts—have had larger powers of preventing a miscarriage of justice than have the judges of the Superior Courts. The section above quoted secures the punishment of offenders, notwithstanding a slip on the part of the justice, and enables the Court or judge to say that a technically correct description of the offence is not imperative.

Sections 3 and 4 may be said to be somewhat novel, in that they give illustrations or examples of difficulties, many of which have arisen and been discussed in

cases and text-books, or which have come before the framer of the Act in the course of his judicial career. As to this form of enactment it might be said, if a precedent were required, that in every well-arranged digest or code the rule is first given and is then followed by illustrations, as witness the course followed by Sir Fitzjames Stephens in his digest of the law of evidence. In the clauses before us it seems the best way of making clear what is intended, and ensuring a full and liberal construction of the Act. Our readers, on referring to these sections, will see how well the light is thrown by them on the main intent of the statute.

Section 5 gives legislative power to do that which is now often indirectly done for the protection of justices from actions, etc., by limiting the use of an order to quash a conviction.

Section 6 provides that no motion to quash a conviction brought before a Court by *certiorari* shall be entertained until proper security be given by the defendant; and it states how the security is to be given. The object of this provision is to make the practice as to security uniform, and to render it more convenient. Justices of the Peace are not generally aware of the Imperial Act requiring them to take security before making a return to *certiorari*. This Act, 5 Geo. 2, cap. 19, sec. 2, is in force under the general adoption of the Laws of England (in the Provinces which adopted them). In Ontario, *R. v. Chuff*, 46 U.C.R. 565, and *R. v. Walker*, 20 C.L.J. 410, are in point. When a defendant is in custody and applies for a writ of Habeas Corpus, the Court or judge under 29 & 30 Vict., cap. 45, directs a *certiorari*; when a writ is issued under this section it is for the assistance of the Court, and a recognizance is not required (see *R. v. Nunn*, 20 C.L.J. 408; 10 Ont. P. R. 395, and *R. v. Whelan*, 45 U.C.R. 396).

Statutes, as we all know, are often put

## SUMMARY PROCEEDINGS BEFORE JUSTICES—SELECTIONS.

in force by proclamation, or by order in Council. This often causes difficulty in proof, and the formal technical evidence is often not easily available. The result is that a defendant is sometimes unable to take advantage of this difficulty, and so defeat the ends of justice. Section 9 provides a remedy by enacting that when a statute is in force by virtue of a proclamation or order in Council, and an objection is taken that such proclamation or order was not given, the Court or a judge shall allow evidence of the issue of such proclamation, or making of such order, to be supplied by affidavit.

The last three clauses of the Act (sections 11, 12 and 13) were inserted last year at the instance of the then Minister of Justice. They merely enlarge the time for appealing. In remote localities it is not always possible to take proper steps for appealing within the time heretofore limited, and these sections prevent a failure of justice and make the law in this respect uniform, as nearly as may be. There are several other provisions of minor importance on matters of detail, which complete the intent of the framer of the Act in reference to the matters of the Legislative Department, to which we cannot refer at length.

Some of our best known and most respected judges throughout the Dominion have expressed themselves as highly avourable to this legislation; agreeing with its provisions and with the desirability of the changes which have been made. The measure received the entire approval of the Minister of Justice, who is entitled to much credit for aiding in placing a very practical and valuable measure on the statute book.

## SELECTIONS.

*INJURY CAUSED BY STATUTORY WATER-PLUG IN HIGHWAY.*

ALTHOUGH County Court decisions lack efficacy as binding authorities, they not infrequently eminently deserve the publicity derived from permanent reports. When well considered, the judgments delivered by highly capable and experienced professors of the law are not, indeed, wholly lacking in authoritative force, while, at all events, entitled to the allegiance of co-ordinate tribunals; but, moreover, what can better serve the purposes of practitioners than the painstaking collection of governing decisions, the acute discrimination of their points, and lucid discussion of principles that may be found in many County Court judgments, both in this country and in England, also, as evidenced in the pages not merely of this Journal but of the *Law Journal* and *Law Times*. Nay, even when not itself laying down a decisive opinion upon some abstract question incidentally arising, but unnecessary to determine with precision, a well-weighed judgment may serve at least to put the matter in a clearer light so as to guide subsequent enquirers. And in illustration of this, reference might be made to *M'Ginnity v. The Town Commissioners of Newry*, reported at the close of last year (19 Ir. L. T. Rep. 69). On the same general subject there discussed, however, we have now before us an adjudication of the English Court of Appeal, and to it alone, not to compare great things with small, attention will here be confined.

We refer to *Moore v. The Lambeth Waterworks Co.*, a good report of which will be found in the June issue of the *Law Journal*. The facts out of which the question arose were few and simple, but the question was both difficult and extensive in its bearings, involving in particular a critical consideration of the decision in *Kent v. The Worthing Local Board* (10 Q.

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B. D. 118, 52 L. J. Q. B. 77), an important case which we believe to be rather better known than might be supposed from the fact that it appears to have escaped the notice of numerous text-writers whose works, dealing with such questions, we have incidentally examined. Moore brought his action for damages incurred by him through falling over a plug belonging to the defendants, the Lambeth Waterworks Co., which they had placed in a certain public footway. The plug projected three-eighths of an inch above the asphalt with which the footway was covered, by reason of the asphalt wearing away, and without any defect in the plug itself, which was correctly laid, and in perfect order. The defendants were a company incorporated by Act of Parliament, with power to put plugs in the highway, and with a liability to provide fire-plugs; and the plug in question was described in the evidence as both a fire plug and an end-plug, in which latter character it was used to flush the pipes. Day, J., gave judgment for the plaintiff; and the defendants, who were amerced in £600 damages, appealed. The facts, indeed, were very similar to those in *Kent v. The Worthing Local Board* (*ubi supra*), where it was held that under such circumstances the plaintiff had a good cause of action. But there, said Lord Esher, M.R., in the present case, "both the water-plug and the road were in the hands of the defendants, and if the plug was not out of order the road was. If the case cannot be upheld on the ground that there was only one authority, I do not see how it can be upheld. It may be that it can be upheld on that ground, but if not, it is not of any authority." And he added that, although it was not necessary to say absolutely that they disagreed with that case, yet, unless it could be supported on the ground of common ownership, he was not prepared to follow it. Lindley, L. J., distinguished that case on the same ground. But Lopes, L. J., boldly avowed that he could see nothing in the distinction; observing that the decision was not put on the ground of the union of liabilities, and that the cases there relied on were not authorities for the proposition asserted; and accordingly, maintaining that the decision in that case should be overruled. Merely adding that

in the present case the distinction, if any, applied because the water company and the road authority were two distinct authorities, let us now proceed to examine the effect of the decision arrived at by the Court of Appeal independently of *Kent v. The Worthing Local Board*.

It was said for the plaintiff that when anyone puts anything in the highway and it becomes dangerous, he is liable for it. But that principle only applies when the thing is put there without authority, when something is left in the highway as a nuisance or an obstruction, the person so acting doing wrong from the very first. Here, however, the company were authorized or obliged by their Act of Parliament to put the plug in the highway; and the Act only imposed on them the obligation of keeping the plug in repair. But it was in repair, and the company had done all they were bound to do. "I can find no duty cast on the defendants, and they have been guilty of no fault, either of omission or commission," said Lindley, L. J. "If either be wrong," said Lord Esher, "it is the road authority." Was it then merely a case in which the plaintiff, having a remedy, failed to obtain redress by reason of proceeding against the wrong party? Not so. "I do not think, indeed, that an action would lie against the road authority," avowed the Master of the Rolls. "This decision is rather hard on the plaintiff if *Gibson v. The Mayor of Preston* (L. R. 5 Q. B. 218) be right, and he cannot sue the road authority," said Lord Justice Lindley. That, indeed, was held too in *Kent v. The Worthing Local Board*, but the reason was that the parish could not be sued, although it might be indicted; but, in *Gibson v. The Mayor of Preston*, we find the rule applied even though the road authority was incorporated. So that unless indeed the principle does not apply when both plug and road are in the same hands, there must be very many equally hard cases. But, of course, the result would be otherwise, at all events, if the thing causing the injury were itself defective, like the valve in *Bathurst v. Macpherson* (L. R. 4 App. Cas. 256), the grating in *White v. The Hindley Board of Health* (L. R. 10 Q. B. 219), and the plug in *Blackmore v. Mile End Old Town* (9



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Q. B. D. 451); and in such cases, at least, it is true enough that, as Crompton, J., observed in *Hartnell v. Ryde Commissioners* (1 B. & S. 361, 33 L. J. Q. B. 39) as quoted by the learned County Court judge in *M'Ginnity v. Town Commissioners of Newry* (19 Ir. L. T. Rep. 69), "there never has been Act of Parliament which has thrown the obligation to repair on two bodies, but the public has always had one body to look to." And see *Howitt v. The Nottingham Tramways Co.*, 12 Q. B. D. 16; *Steward v. The North Metropolitan Tramways Co.*, 16 ib. 556.—*Irish Law Times*.

### JOINT BANKING ACCOUNT BY HUSBAND AND WIFE.

IN the excellent "Treatise on Banking Law," by Mr. J. Douglas Walker, the second edition of which has been published this year by Stevens & Sons, we read as follows:—"Where a drawing account is opened by a husband in the name of his wife, or the husband pays money into an account opened by his wife, the banker's obligation is to honour the cheque of either husband or wife during their joint lives (*Lloyd v. Pugh*, L. R. 8 C. A. 88; *Parker v. Lechmere*, 12 C. D. 256). If an account be opened by the husband in the joint names of himself and his wife, the balance standing to the credit of such account at his death becomes the absolute property of his widow, provided his intention in so opening the account was to make provision for her in that way (*Williams v. Davies*, 33 L. J. P. C. 127; but it does not become the property of the widow if the intention was only to provide a convenient mode of managing affairs (*Marshall v. Crutwell*, L. R. 20 E. 328). This doctrine has formed the subject of consideration in another case (*Re Young, Trye v. Sullivan*), reported in this month's number of the *Law Journal*, where, however, the only one of the authorities above cited that was mentioned was *Marshall v. Crutwell*. Nor could the important practical consequences flowing from the application of this doctrine be better illustrated than by the recent decision of Mr. Justice Pearson, to which we propose to direct attention accordingly.

Not every banking institution, indeed, is conducted with sufficient intelligence to accord its customers the advantages in question, and ignorant routine sometimes prevails to such an extent as to deprive those institutions themselves of an excess of custom sorely needed at the present time. Indeed, within the present week the present writer, associated with others, proposing to open two such accounts with the Bank of Ireland, was informed by the secretary that in that establishment they could not be received. And considering that it is with the money of depositors, rather than with the capital provided by the shareholders, that bank dividends are paid, it may well seem somewhat strange that any bank should be found so firmly fixed in its "old ways" as, in consequence, to refuse deposits, and not inconsiderable either—a matter worthy of some notice by those who may happen to be interested, and who will have to suffer the results of such management. What detriment it would be to a bank we are utterly at a loss to imagine; while to the depositors the doctrine of survivorship is of immense moment, besides the benefit of having individual power to draw against the joint fund—both points deriving an enhanced use and interest in connection with the now prevailing separate *status* of husband and wife.

Now, in *Trye v. Sullivan*, the circumstances under which the question arose were as follows:—By the marriage settlement of Colonel James Young and Annie Eliza Longworth, executed in June, 1846, certain personal estate was settled, in the events which happened, on trust, after the death of the survivor of the husband and wife, if the wife should be the survivor, for the wife, her executors, administrators, and assigns. After the marriage four different banking accounts were kept by Colonel and Mrs. Young: Colonel Young's separate account at Messrs. Roberts, Mrs. Young's separate account at the County of Gloucester Bank, a joint account at the latter bank, and (after some time had passed) a joint interest account at the same bank. Mrs. Young had a substantial income of her own, and it was from that source principally that moneys were carried to the joint account. The moneys standing to that account were employed by Colonel and Mrs. Young in paying

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(with some assistance from Mrs. Young's separate account) the household expenses, in paying some of Colonel Young's separate expenses, and in providing for investments which were made in Colonel Young's name. In 1872 a sum of £1,500 Lancashire and Yorkshire Railway debenture stock, and a sum of £90 Midland Railway ordinary stock, were purchased out of moneys standing to the joint account (except as to half the price of the Midland stock, which was provided by Mrs. Young's separate account), and were placed in the joint names of Colonel and Mrs. Young. By her will dated the 31st of July, 1879, Mrs. Young bequeathed all her moneys, funds and property which she had power to dispose of by the settlement or otherwise to C. B. Trye, W. H. Lloyd, R. N. Trye, and H. Sullivan, upon trust to pay specific and pecuniary legacies, and subject thereto, to pay and transfer the residue to C. B. Trye and W. H. Lloyd equally. In 1882 both Colonel and Mrs. Young died, the latter surviving her husband for five days only, and not re-executing her will made during coverture. Various questions arose in the administration of Mrs. Young's estate, among which were the questions whether the two sums of railway stock which at the death of Mrs. Young were still standing in the joint names of her husband and herself, and the sums standing at the same date to the credit of the joint account, survived to Mrs. Young on her husband predeceasing her; and, if so, whether they passed by her will to her residuary legatees, or whether they were undisposed and passed to her next-of-kin. And thereupon a special case was stated for the opinion of the court on these and other questions, the plaintiff being C. B. Trye, and the defendants being W. H. Lloyd and the representatives of Colonel Young and the next-of-kin of Mrs. Young. It came before Mr. Justice Pearson when, on behalf of the two residuary legatees under Mrs. Young's will, it was contended that both the railway stock and the joint balances survived to her on her husband's death, and passed by her will, though made during coverture; it being argued, for Colonel Young's representatives, that the stock and balances were appropriated to him, that his wife had only to deal with them on his behalf dur-

ing his life, and that they did not survive to her (citing *Marshall v. Crutwell, ubi supra*); while the next-of-kin submitted that the stock and balances survived to Mrs. Young, but did not pass by her will, it not having been re-executed after her husband's death (citing *Mayd v. Field*, 8 C. D. 584).

Said Pearson, J.:—"Colonel and Mrs. Young seem to have lived for many years a married life such as married people ought to live, on terms of affection and mutual confidence; and I can well understand that the lady, with a delicacy that I hope is not uncommon, felt that it would be unpleasant for her husband to be reminded from day to day that he was living to a great extent upon, and drawing a large share of, the money required for household expenses from his wife, and for that reason this joint account, which was used to a great extent for household expenses, seems to me to have been opened. That being so, the inference I draw is, that it was simply intended that the account should be joint, and that the lady intended to sink all idea of separate character in order that her husband should be able to draw." He did do so, as we have seen; and, with the consent of his wife, in the learned judge's opinion, had invested in his own name from time to time, a large portion of the sums drawn; but there was no dispute as to such investments that they must be treated as his property. However, it had been argued, continued Mr. Justice Pearson, "that the proper inference from the investment in the joint names was that, though the lady was willing to dispose of, and to allow her husband to dispose of the joint funds in household expenses and his private investments, she drew a limit to that application, and that a certain portion of the money so paid in was to be invested in the husband's and wife's names; that it should be earmarked as the wife's separate property. I can arrive at no such conclusion. I think that, just in the same way as the joint account was in every sense joint, with power to each party to draw, and free from any idea of separate estate, so the joint investment was subject to the ordinary incidents of a joint investment. The whole circumstances of the case impress my mind, without any doubt

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or uncertainty, with the conviction that it was intended that whichever survived was to have the benefit of the investment. I do not believe that the lady had the slightest intention or wish that if she died in the lifetime of her husband he should not have the investment; nor do I believe that there was any intention that if she survived the debenture stock should be earmarked so as to be so subject to the incidents of her separate property. To my mind, the moment you come to the conclusion that the joint account was kept in order to be used by either party (each party having perfect confidence in the other that it would be used with perfect propriety), without any distinction as to the sources from which it arose, it is very difficult to suppose that any purchase made from it was to have a different nature." For our part, we cannot help regarding this as a rather important decision, especially in its bearings in that of *Marshall v. Cruttwell* (*ubi supra*), and on the strength of it the writer has personally acted. But it will be found that, in practice, one of the advantages afforded by such joint accounts, the power to each party to draw, will not be allowed by some banks without an express direction from the depositors at the time.—*Irish Law Times*.

#### MUTUAL RIGHTS AND DUTIES OF THE BENCH AND BAR.\*

Few or none of us but remember the time when we looked upon courts of justice with a much greater feeling of respect than that with which we now regard them. I do not believe that this is due to the degeneracy of the courts in the matter of learning or integrity. It is due partly to the fact that familiarity has destroyed much of the sense of dignity with which they impressed us, and partly to the fact that many of our courts are not, in fact, as dignified in manner as they used to be. But to whichever cause we refer it, we perceive that this lessening respect is due directly or indirectly wholly to the failure

or knowledge of the failure on the part of the bench and bar to observe and respect their mutual rights and duties. Judges are as learned and lawyers as able and eloquent now as they were years ago, or if they are not, even this may be traced to the cause to which we are now adverting.

Is it not time that we should pause and soberly consider the question as to whether we are not doing a grave injury to ourselves and the profession, whose interests are for the time being committed to our keeping, by suffering the want of dignity and courtesy which obtains in our courts at the present day? Far be it from me to advocate anything which will have a tendency to produce a race of dude practitioners. Let us have nothing which will substitute dandyism for force and knowledge of the law. Let us by no means be so courteous to any one as to sacrifice in any degree the interests of those whom we represent. We have not sworn that that we will at all times be Chesterfields in manner; but we *have* sworn to be faithful and true to our clients; and, besides, are bound by all considerations which weigh with honourable and upright men not to betray those who have confided their interests so fully and entirely to our keeping.

There is, however, a certain degree of manly courtesy which tends directly to the due and proper administration of justice and to the production and development of able and learned judges and lawyers.

The result in any given case depends upon the joint labours of the counsel engaged in it and the judge who sits upon the bench to try it. Do not the plainest dictates of common sense teach us that that result will be better when there is the proper degree of harmony amongst the agents than when there is unseemly discord? I say unseemly discord or contention. I do not mean to advocate a courtesy which will make a lawyer forget that he is working for his *own* and not his antagonist's client. I do not mean to exclude vigorous professional strife between opposing counsel. I do not even mean to exclude a reasonable amount of temper between them in a proper case. I refer more particularly to the harmonious working of the judge and the lawyers. I would

\* An address recently delivered before the Allegheny County Bar Association, by one of its members.

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exclude the assumption on the part of attorneys when a judge appears to differ with them, either that he is unfair towards them or that he is unwilling to be convinced that he is wrong.

It is true that we are apt when we have studied a given proposition and convinced ourselves that it is perfectly clear, to conclude that he who does not see it as we do must be wilfully blind, and are apt when our feelings are deeply enlisted, to display some heat; yet we can at all events cultivate a respect for the honesty and fairness of intent of those who, by reason of their very position, must needs disappoint one party or the other. I would further exclude the assumption by lawyers that they have no interest in maintaining the dignity of the court. They are a part of it. It is there that they must fight their battles and achieve their triumphs or suffer their defeats. Can we not learn that it is better for us to strive in a courteous and dignified manner than to wrangle in such way as to convince others that we are not worthy of their respect, by showing them that we do not respect ourselves?

It is, however, an indisputable fact that the great burthen of responsibility for maintaining the dignity of the court rests primarily upon the judge who presides. In the first place, by his method of conducting business he can encourage and promote proper conduct in those who practise before him. No observant man can fail to see the vast influence for good or ill which the bench has over the manners of the bar. No bar will *permit* its members to treat discourteously a courteous and fair judge. The influence and authority of his position aid him greatly. He certainly has, too, great inducements to treat courteously and hear patiently those who practise before him. Under such circumstances a judge really gets the benefit of the lawyers' aid in building up his own reputation. Not only because his reputation is necessarily a part of that of the court, but also because under such circumstances lawyers will work with a will to honestly give to a judge the benefit of their best labour in collecting all the learning bearing upon a particular point, and in aiding him to a correct conclusion in each particular case.

It seems to me that a judge must have

a little tact if he cannot, even if he is elevated to the bench without possessing much learning, with the aid of a bar properly managed and encouraged, succeed in administering the duties of his high office in a learned and dignified manner, and acquiring an enviable reputation as a judge. Beyond this, the judge must so act as to secure the hearty and industrious co-operation of his bar, or the interests of justice suffer. No one who is fit to sit upon the bench will for a moment pretend that he knows so much that it is impossible for him to receive light from any lawyer who will study his case. It is impossible for any judge to decide his cases properly without the aid of the bar. I have no confidence in cases of any difficulty whatever, decided without full argument; nay, more, I have no confidence in cases decided without full *oral* argument. Those courts which are bringing into vogue the practice of dispensing with oral argument are, in my opinion, doing it at the expense of the destruction of a noble profession, and the ultimate irremediable injury of the science of the law. There is, there can be, no substitute for oral argument.

Says Judge Dillon: "As a means of enabling the court to understand the exact case brought thither for its judgment—as a means of eliciting the very truth of the matter, both of law and fact, there is no substitute for oral argument. None! I distrust the soundness of the decision of any case, either novel or complex, which has been submitted wholly upon briefs. Speaking, if I may be allowed, from my own experience, I always felt a reasonable assurance in my own judgment when I had patiently heard all that opposing counsel could say to aid me, and a very diminished faith in any judgment given in a cause not orally argued. Mistakes, errors, fallacies and flaws elude us in spite of ourselves unless the case is pounded and hammered at the bar. This mischievous substitute of printers' ink for face-to-face argument impoverishes our case law at its very source, since it tends to prevent the growth of able lawyers, who are developed only in the conflicts of the bar, and of great judges who can become great only by the aid of the bar that surrounds them."

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But no lawyer will prepare himself for an oral argument unless he has reasonable assurance that he will be listened to patiently and courteously when he comes into court. Doubtless, lawyers will often talk uselessly, but better that than that they should not talk at all, and thereby the interests of justice should suffer. A court should be not only a place where cases are argued but a school where lawyers are trained to make arguments. Hence, arguments, within reason, when prepared, should be listened to, whether made by lawyers young or old. Young lawyers who are fresh from the study of foundation principles, and who have industriously studied a case, are by no means to be despised when heads are put together for the purpose of arriving at the true decision; and, besides, those who are now *young lawyers* are one day to do the important work of our courts. I would most respectfully submit to the judges before whom they practise, whether they are doing their duty if they fail to patiently hear their causes, not only for the sake of men and the causes themselves, but also for the sake of the training for future work which is thus afforded.

If the advantages of one course are great the disadvantages of an opposite one are no less marked. I need not describe to you the discomfort of a court where judges and lawyers have lost their tempers, and feel sore over treatment received. You have all seen such things. Such a state of things is unpleasant to every one, profits no one, and hurts many. It absolutely destroys the dignity of the of the court. Disrespectful and insulting remarks are often made by the judge to lawyers, and the judge who can treat his bar with disrespect and be himself treated with real respect has yet to be discovered. He may enforce the observance of a formal outward respect, but it is only outward. It presents the case of the lawyer who was threatened with a fine for expressing his want of respect for the court, and who defended himself by asserting that on the contrary he had carefully concealed that want of respect.

Is it not the duty of the judge, as well as the bar, to treat the court with respect, and are not the lawyers in attendance and transacting business a part of the

court? The court is not the mere person of the judge. Lawyers understand that when they come into court to transact the business of their clients and carry themselves properly they have just as well ascertained a standing there as anyone else. The judge is for most purposes the special organ and representative of the court, and lawyers are bound to treat him with respect, but this does not involve any obligation upon their part to forget or lay aside their manhood. If we are to have lawyers who will bring honour and dignity, and not shame and disgrace upon a court, then we must have lawyers who, coming into court as *men*, respecting themselves and demanding respect as such, shall find their claims recognized and appreciated.

Let us remember, however, always, that in things human, perfection is seldom or never attained. Let us remember the annoyances which beset bench and bar in practice. Let us remember, too, that men honest, fair, generous and courteous at heart frequently have the misfortune to possess quick tempers; and that sometimes, with men striving earnestly to do their full duty, an unexpected annoyance suddenly destroys both dignity and courtesy. I err in saying "let us remember"—lawyers do remember these things. They are of all men the most generous in forgiving errors. All they ask of those with whom they deal is honest purpose and earnest endeavour to do right. With this, the seventy times seven occasions for forgiveness or forbearance exhaust not their patience.

### THE PENALTY OF DEATH.

THE division on Sir Joseph Pease's proposal to abolish the penalty of death is satisfactory, as showing that in this particular, at all events, the new House of Commons is not disposed to try rash experiments. It cannot be said that Sir Joseph Pease offered the House any great inducement to embark on his doubtful venture. His statistics may have been indisputable, but certainly they were not undisputed. Or, rather, to put it quite accurately, they were met by other statistics which pointed to the opposite conclusion. If in Belgium and the Nether-

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lands no increase of murders has followed upon the disuse of capital punishment, a very great increase has followed upon a similar step in Switzerland and Würtemberg. The former country, indeed, has returned upon itself, and capital punishment is once more lawful. Moreover, a part of Sir Joseph Pease's speech would have been more in place if it had been made in support of Mr. Howard Vincent's amendment. The blundering executions of which so much has lately been heard reflect great discredit on the present haphazard method of appointing executioners, but they have no bearing on the question whether a murderer ought to be hanged or imprisoned for life. The number of applications show that the dislike generally felt towards the office is very far from being universal; and wherever there is competition, it ought not to be impossible to find a competent man for the post. So, too, it is quite true that the existing definition of murder is too wide. Now that certain classes of murderers are never executed, what is the use of passing sentence of death on them? The end the legislator should keep before him in the allotment of punishment to crime will be attained in proportion to the certainty with which the one is seen to follow upon the other. The difficulty of drawing a line between murders and murders may be great, but we refuse to believe that it is insuperable. Judges and Crown Counsel vie with one another in imploring juries not to find a prisoner guilty of murder unless the evidence is irresistible; and if occasionally a verdict is open to question, the Home Secretary is certain to advise a reprieve. The impression that innocent men are hanged rests, we fancy, on the fact that men who have been sentenced to death and reprieved are sometimes proved to be innocent. There are two reasons for retaining capital punishment which have lost none of their force. It is a common and, on the whole, valid argument for limiting the penalty of death to murder, that if you inflict it for any other crime, however heinous, there will be a strong temptation to add murder to that other crime in order to get rid of a witness. The abolition of capital punishment would have precisely the same result. It would be directly to the interest of a burglar to

put to death a man who tried to defend his property, because to do so would subject him to no greater penalty, while by making identification difficult it would make conviction improbable. There are many cases in which the commission of a crime would be rendered easier by killing some one; and to all appearance, what mainly deters the criminal from thus doubling his guilt is his knowledge that in doing so he will much more than double his punishment. Death is something different in kind from perpetual imprisonment, and though he is ready to risk the one, he is not ready to risk the other. The whole force of this motive would disappear if he could double his guilt and yet leave his punishment what it was. The second of these still valid reasons is that the abolition of capital punishment would be a virtual gift of impunity to prisoners already under sentence of imprisonment for life. Whatever they may do, nothing worse can befall them than has befallen them already. It would be absurd to allot a lighter punishment to a second murder than has already been allotted to a first—to put a man on bread and water for a week for killing a prison warden, when he has been sentenced to penal servitude for life for killing his worst enemy. Yet the law would forbid the infliction of the only greater punishment, and, from the nature of the case, the original punishment cannot be repeated. There is no way that we can see out of this dilemma; consequently, the one thing to be done is to retain capital punishment. At least, if we let it go, we shall have greatly to increase our prison staff, to instruct the men composing it to be on the watch for the first sign of disturbance, and then to shoot freely by way of prevention, since we must not hang by way of penalty. One of the speakers in the recent debate pleaded not for the life of a murderer, but for his less painful death. "There are other modes of taking life besides the barbarous way of hanging a man by the neck until he is dead." In this, no doubt, Mr. Cooke is right. The range of choice is no longer limited to the axe, the cord, the musket and the guillotine; a mask charged with prussic acid, a glass of pleasantly flavoured liquid, a hermetically sealed chamber, would deprive death, if not of its terrors,

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at all events of its suffering. The murderer would be better off in this respect than the majority of his fellow-men. There is physical agony—at times very great physical agony—attending upon their deaths; there would be none at all attending upon his. We agree with Mr. Cooke that when the law is taking life, it ought not to take it with unnecessary pain; but we do not see that we are bound to call in the help of science to make the death of a murderer less painful than it would probably have been if he had never been guilty of murder. There is no reason, however, to believe that hanging is more painful than any of the more ordinary forms of death. It might be long before the relatives of a man who had been killed by poison felt as much disgraced as they would had he been hanged. Moreover, frequent repetition has made this form of death sufficiently familiar to take hold of the popular imagination. Men who are tempted to murder can call up before their mental vision all the circumstances of the gallows; and where the imagination is sluggish, this is in itself a considerable advantage. —*Spectator*.

### LIFE INSURANCE — ACCIDENT POLICY—SUICIDE.

A CASE of much interest relating to the subjects of life insurance and insanity, was decided recently by the U. S. Circuit Court for the Eastern Division of Wisconsin.<sup>1</sup> The facts were that in May, 1884, Mr. Crandall took out an accident policy for \$10,000, his wife, who was the plaintiff in the action, being the beneficiary. In the policy it was provided that the insurance should not extend to death or disability "which may have been caused wholly or in part by bodily infirmities or disease."

While the policy was in force the insured Edward M. Crandall took his life by hanging, and the jury to whom the case was submitted for a special verdict on the facts found that at the time of the act of self-destruction, he was insane.

The court, after reciting the facts, adds:

"The question reserved for consideration by the court, and now to be determined, is whether the death was one covered by the policy. The question of liability, as it here arises upon an accident policy of insurance, seems to be one of first impression. Unaided by direct authority, the court is called on to determine, first, whether under such a policy as this, death from self-destruction occurring when the insured is insane, may be said to have been caused by bodily injuries effected through accidental means. This question, it will be understood, is here to be considered quite independently of the question whether disease or physical infirmity was a promoting cause of death."

The court then assumes upon the verdict and the facts that "when the deceased took his life, it was not his voluntary rational act,"<sup>2</sup> and proceeds to argue that, "if in consequence of his condition of irresponsibility, the violence while inflicted upon himself, was the same as if it had operated upon him from without, why was not the death an accident, within the definition of the term as given by Bouvier, namely, an event which, under the circumstances, is unusual and unexpected by the person to whom it happens. The happening of an event without the concurrence of the will of the person by whose agency it was caused."

The court in pursuing this subject cites a number of cases in which the fatal act was the act of the deceased, and yet held to be an accident within the meaning of an accident policy; that of a man in a dazed and unconscious condition who, in a railway car walked to the platform and fell to the ground;<sup>3</sup> that of a person killing himself while in a state of delirium, the court saying that such deaths and those resulting from taking poison by mistake are more properly deaths by accident than deaths by suicide.<sup>4</sup> In an English case, the court<sup>5</sup> in passing upon the question whether a policy of insurance upon life is rendered void by the suicide of the insured when insane, speaks of such

<sup>1</sup> Crandall v. Accident Insurance Company of North America, Chicago Legal News, April 10, 1886, p. 257.

<sup>2</sup> See *Breasted v. Farmers', etc. Co.*, 4 Hill, 73, 75.

<sup>3</sup> *Scheiderer v. Ins. Co.*, 58 Wis. 13.

<sup>4</sup> *Pierce v. Travellers', etc., Co.*, 34 Wis. 395.

<sup>5</sup> *How v. Life Ins. Co.*, 7 Jurist. (N.S.) 693.

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a death as just as much an accident as if the insured had fallen from the top of the house.

Upon a review of these cases, the Court arrives at the conclusion that the death of a person who while insane takes his own life is not suicide, but a death by accident, and upon that point within the terms of the policy under consideration. There is, however, another question of much interest involved in this case, and that is what, under the provisions of a policy that covers accidents only, was the cause of death? On this subject Mr. Justice Miller says:<sup>6</sup> "One of the most valuable criteria furnished by the authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as a cause of the misfortune, the other must be considered too remote." In another case,<sup>7</sup> Mr. Justice Strong says:

"There is undoubtedly difficulty in many cases attending the application of the maxim, '*proxima causa non remota spectatur*,' but none when the causes succeed each other in order of time. In such cases the rule is plain. When one of several successive causes is sufficient to produce that effect, the law will not regard an antecedent cause of that cause, or the '*causa causans*.' In such a case there is no doubt which cause is the proximate one, within the meaning of the maxim. But when there is no order of succession in time, when there are two concurrent causes of a loss, the predominating efficient one must be regarded as a proximate, when the damage done by each can not be distinguished."

In support of this view the court cites a number of English cases, and one decided by the Supreme Court of the United States,<sup>8</sup> and it will be borne in mind that these are "accident" cases. In one of them the insured became suddenly insensible while bathing, and was found in a

shallow pool, drowned.<sup>9</sup> The drowning was held to be the cause of the death, not the sudden attack which caused it. Another case was like it, the deceased was crossing a stream, was taken with an epileptic fit, fell into the water and was drowned. The cause of death was held to be the drowning, not the epileptic fit, and the drowning was therefore accidental and charged the company.<sup>10</sup> And so with the other cases cited. The opinion of the court on this point is sufficiently supported by authority, but in one point of view we could wish the ruling clearer. The policy expressly excepts death caused "wholly or in part by bodily infirmities or disease." Now, has this expression "in part," no significance whatever? And if any, what does it mean? Can it be that under that expression a remote cause can be admitted to be "in part" and concurrently with the proximate, the cause of the death? Cannot the insanity of the person who took his own life be regarded as "in part" the cause of his death? On this point we are not entirely satisfied. Admitting that, without that expression, the court could not in determining the cause of death, go behind the proximate cause to a remoter cause; with that expression and giving full significance to it, we should think the court might well find that such remoter cause was "in part" the cause of the death. In other words, when the rule of law is modified by the contract of the parties, admitting those words "in part" into the conditions of the policy, those words must be construed in their natural sense, and given the effect to which in ordinary discourse they are entitled. If an insane man kills himself, the instruments of death, or rather the use of them, constitute the proximate cause of death, but is not the fact that the man was insane, and deprived of the protection of reason and healthy instinct, also "in part" the cause of his death?—*Ex.*

<sup>6</sup> Reynolds v. Accidental Ins. Co., *supra*.

<sup>10</sup> Winspeare v. Accident, etc., Co., *supra*.

<sup>7</sup> Ins. Co. v. Tweed, 7 Wall. 44.

<sup>8</sup> Ins. Co. v. Transportation Co., 12 Wall. 199.

<sup>9</sup> Reynolds v. Accidental Ins. Co., 22 Law Times Rep. (N.S.) 820; Winspeare v. The Accident Ins. Co. (Limited), 6 L. Rep. (Q. B. Div.) 42; Lawrence v. The Accidental Ins. Co. (Limited), 7 L. Rep. (Q. B. Div.) 216; and Scheffer v. R. R. Co., 105 U. S. 249.



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## NOTES OF CANADIAN CASES.

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### SUPREME COURT OF CANADA.

#### CHATHAM V. DOVER.

*Municipality—Drainage in—Petition for—Extending into adjoining municipality—Report of engineer—Not defining proposed termini—Benefit to lands in adjoining municipality—Assessment on adjoining municipality.*

Under the drainage clauses of the Municipal Act a by-law was passed by the township of Chatham, founded on the report, plans and specifications of a surveyor, made with a view to the drainage of certain lands in that township. The by-law, after setting out the fact of a petition for such work having been signed by a majority of the ratepayers of the township to be benefited by the work, recited the report of the surveyor, by which it appeared that in order to obtain a sufficient fall it was necessary to continue the drain into the adjoining township of Dover. The surveyor assessed certain lots and roads in Dover, and also the town line between Dover and Chatham, for part of the cost as for benefit to be derived by the said lots and roads therefor. The township of Dover appealed from this report, under sec. 582 of 46 Vict. cap. 18, on the grounds, *inter alia*, that a majority of the owners of property to be benefited by the proposed drainage works had not petitioned for the construction of such work as required by the statute—that no proper reports, plans, specifications, assessments and estimates of said proposed work had been made and served as required by law—that the council of Chatham, or the surveyor, had no power to assess or charge the lands in Dover for the purposes stated in the said report and by-law—that the report did not specify any facts to show that the council of Chatham, or their surveyor, had any authority to assess the lots or roads in Dover

for any part of the cost of the proposed work—that the assessment upon lots and roads in Dover was much too high in proportion to any benefit to be derived from the proposed work, and that no assessment whatever should be made on the lands or roads in Dover as the work would, in fact, be an injury thereto—and that the report did not sufficiently specify the beginning and end of the work, not the manner in which Dover was to be benefited.

Three arbitrators were appointed under the provisions of the Act, and at their last meeting they all agreed that the township of Dover would be benefited by the work, but R. F., one of the arbitrators, thought \$500 should be taken off the town line, and W. D., another of the arbitrators, held that, while the bulk sum assessed was not too great, the assessment on the respective lands and roads and parts thereof should be varied, but that this was a matter for the Court of Revision. A memorandum to this effect was signed by W. D. and A. E., the third arbitrator, at the foot of which R. F. signed a memorandum that he dissented and declined to be present at the adjourned meeting to sign the award—"if in accordance with the above memoranda." Later, on the same day, W. D. and A. E. met and signed an award determining that the assessment on the lands and roads in Dover, and on the town line made by the surveyor should be sustained and confirmed, and that the appeal should be dismissed, and that the several grounds mentioned in the notice of appeal had not been sustained.

The Queen's Bench Division set aside this award on two grounds, namely: want of concurring minds in the arbitrators, and of defect in the surveyor's report in not showing specifically the beginning and end of the work, 5 O. R. 325. The judgment of Queen's Bench Division was sustained by the Court of Appeal, 11 Ont. App. R. 248.

On appeal to the Supreme Court of Canada, *Held* (RITCHIE, C. J., dissenting), that the award should have been set aside upon the ground that it was not shown that a petition for the proposed work was signed by a majority of the owners of the property to be benefited thereby, so as to give to the corporation of Chatham jurisdiction to enter the township of Dover and to do any work therein.

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That the arbitrators should have adjudicated, upon the merits of the appeal against the several assessments on the lots and roads assessed, as their award was, by secs. 400 and 403 of 46 Vict. cap. 18, made final, subject to appeal only to the High Court of Judicature, and it was not a matter for the Court of Revision to deal with at all, as held by one of the arbitrators. That the award should have been set aside because it did, in point of fact, as it stood, profess to be a final adjudication against the township of Dover upon all the grounds of appeal stated in the notice of appeal, and did, in point of fact, charge every one of the lots and roads so assessed with the precise amount assessed upon them respectively, although, by a minute of the proceedings of the arbitrators who signed the award, it appeared that they refused to render any award upon such point, and expressed their intention to be to submit that to the Court of Revision.

That the arbitrators should have allowed the appeal to them against the surveyor's assessment, and that their award should have been set aside on the merits, because the evidence not only failed to show any benefit which the lots or roads in Dover which were assessed would receive from the proposed work, but the evidence of the surveyor himself showed that he did not assess them for any benefit the work would confer upon them but for reasons of his own which were not sufficient under the statute, and did not warrant their being assessed.

*Appeal dismissed with costs.*

*Pegler*, for the appellants.

*C. Robinson*, Q.C., and *Wilson* for the respondents.

### JOHNSON V. CROSSON.

*Trespass to land—Conflicting titles—Description of locus in quo—Boundaries.*

A suit was brought in the Chancery Division of the High Court of Justice for Ontario to restrain the defendant from trespassing on the lands claimed by the plaintiff, and for damages for trespass already committed. The lands in question were described in the statement of claim as being in concession "C" in

the township of Etobicoke, and the defendant, in his statement of defence, denied the plaintiff's right to the possession of said lands, and claimed himself to be the owner in fee of the same; he also claimed that the lands in question were not in concession "C," but were part of certain lots in concession "B" in said township. On the hearing each party gave evidence of title in himself, the principal contention being as to the location of the land, and judgment was given for the plaintiff.

*Held*, reversing the judgment of the Court below, that the title was in the defendant, under the evidence produced at the hearing, and that he was therefore entitled to have judgment entered for him with costs of defence.

*Held*, also, that the said lands were in concession "B," and not in concession "C," as claimed by the plaintiff.

*Appeal allowed with costs.*

*C. Robinson*, Q.C., and *Reeve*, for appellant.

*Osler*, Q.C., for respondent.

### KEARNEY (Plaintiff), Appellant and CREELMAN AND REID (Defendants), Respondents.

*Will—Devise under—Mortgage by testator—Foreclosure of—Suit to sell real estate for payment of debts—Decree under—Conveyance by purchaser at sale under decree—Assignment of mortgage—Statute confirming title.*

Appeal from the Supreme Court of Nova Scotia.

A. M. died in 1838, and by his will left certain real estate to his wife, M. M., for her life, and after her death to their children. At the time of his death there were two small mortgages on the said real estate which were subsequently foreclosed, but no sale was made under the decree in such suit.

In 1841 the mortgages and the interest of the mortgagee in the foreclosure suit were assigned to one J. B. U., who, in 1849, assigned and released the same to M. M.

In 1841 M. M., the administrator with the will annexed of the said A. M., filed a bill in Chancery for the purpose of having this real estate sold to pay the debts of the estate, she having previously applied to the Governor-in-Council, under a statute of the Province, for

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leave to sell the same, which was refused, on the ground that such leave could not be granted for the sale of a particular part of the estate, and if the whole estate was sold, and there should be a surplus, there was no mode of apportioning such surplus among the devisees. A decree was made in this suit and the lands sold, the said M. M. becoming the purchaser. She afterwards conveyed said lands to the commissioners of the lunatic asylum, and the title therein passed, by various acts of the legislature of Nova Scotia, to the present defendants; a statute having been passed in 1874 confirming the title to the said lands in the Commissioner of Public Works and Mines.

M. K., devisee under the will of A. M., brought an action of ejectment against the Commissioner of Public Works and Mines and the resident physician of the lunatic asylum, which was built on said lands, and in the course of the trial contended that the sale under the decree in the Chancery suit was void, inasmuch as the only way in which land of a deceased person can be sold in Nova Scotia is by petition to the Governor-in-Council. The validity of the mortgages and of the proceeding in the foreclosure suit were also attacked. The action was tried before a judge without a jury, and a verdict was found for the defendants, which verdict the Supreme Court of Nova Scotia refused to disturb. On appeal to the Supreme Court of Canada,

*Held*, affirming the judgment of the Court below, that even if the sale under the decree in the Chancery suit was invalid, the title to the land would be outstanding in the mortgagee or those claiming under her, and the plaintiff therefore, could not recover in an action of ejectment.

*Semble*, that such sale was not invalid, but passed a good title; HENRY, J., *dubitante*.

*Held*, also, that the statute cap. 36, sec. 47 R. S., 4th series, vested the said land in the defendants if they had not a title to the same before. HENRY, J., *dubitante*.

Appeal dismissed with costs.

Wallace, for the appellants.

MacLennan, Q.C., and Graham, Q.C., for the respondents.

## CHANCERY DIVISION.

Ferguson, J.]

[April 16.]

### BUILDING AND LOAN ASSOCIATION V. PALMER ET AL.

*Setting aside alleged fraudulent conveyance of personal property—Evidence of collusion or fraud—Judgment and execution creditors—48 Vict. c. 26, ss. 2 & 3.*

In an action by a creditor for an amount due on a mortgage and to set aside a conveyance of personal property in which the judge who tried the case found that the transaction complained of was not made with intent to defeat the claims of creditors or to give a preference, and that no collusion or fraud was proved. It was

*Held*, that, as none of the creditors were judgment and execution creditors, in the absence of fraud, the plaintiffs could not set aside the transaction under the statute of Elizabeth, and

That although under 48 Vict. c. 26, s. 2 (O), it might possibly be that the transaction should be held to be void as against creditors as having the effect of defeating, delaying or prejudicing creditors, yet as the sale was not a sham or colourable one, but was a real transaction and *bona fide*, and a note was given as actual present consideration on which defendant, Ferguson, was liable, and which he afterwards paid, section 3 applied and protected defendants, and the plaintiffs failed on that branch of the case.

A. Cassels, for plaintiffs.

Guthrie, Q.C., for defendants, the Palmers.

Moss, Q.C., for defendant, Ferguson.

Boyd, C.]

[May 13.]

### MURPHY V. KINGSTON AND PEMBROKE RY.

*Railways and railway companies—Deviation—One mile limit.*

*Held*, that under the proper construction of 42 Vict. ch. 9, sec. 8, sub-sec. 11, being the Consolidated Railway Act of 1879, the limits of deviation of a railway must not exceed one mile from the line of railway in case of lands,

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as shewn on the plans and books of reference, or of alterations thereof; but even within one mile from the said line no deviation shall be permitted, except in such instances, as are provided for in the special Act, and where, as in this case, the special Acts relating to a railway make no provision for deviation, they have no right to expropriate lands not shewn on their said plans and books of reference, even though within one mile from their line, as shewn on the said plans and books of reference.

*Black*, for the plaintiff.

*A. J. Callanach*, for the defendants.

Rose, J.]

[May 14.]

### MACDONALD V. ELLIOT.

*Mortgage—Action on covenant—Statute of limitations.*

Action on covenant in a mortgage dated October 13th, 1866; writ issued February 17th, 1886. Plea that plaintiff's cause of action was barred by Statute of Limitations, no interest on the principal money secured having been paid at any time.

*Held*, that the plaintiff was entitled to judgment: *Allen v. McTavish*, 2 A. R. 278, followed in preference to *Sutton v. Sutton*, 22 Ch. D. 511, and *Fearnside v. Flint*, *ib.* 579.

The covenant provided for payment of interest at nine per cent. up to the end of the year from the date of the mortgage.

*Held*, there being no evidence why such rate of interest was provided for, and it being matter of common knowledge that nine per cent. was not considered excessive for advances in the year 1866, and some following years, the same rate of interest should be allowed for the years subsequent to the expiry of the first year.

*J. B. Jackson*, for the plaintiff.

*T. B. Blackstock*, and *M. Walsh*, for the defendant.

### FLOTSAM AND JETSAM.

**RULED OUT AT LAST.**—General Nye had cross-examined a witness at great length before a presiding judge who was peevish and irritable as well as rather dull, and he had frequently put the same questions, which the judge had ruled against as improper. At last the patience of the judge was exhausted, and he petulantly asked: "General Nye, what do you think I am sitting here for?" Nye looked up at the bench, and, with grave countenance, answered: "You have got me this time, your honour."—*Washington Law Reporter*.

**LICENSE OF THE BENCH.**—The great case of *Hawkins, J., v. Cock*, which agitated the bar last week, has ended in a decision of the Divisional Court in favour of the defendant. "Mr. Cock," said Mr. Justice Grove, "was not to blame;" and Mr. Justice Stephen went further, and remarked that "Mr. Cock had done nothing to be ashamed of," and when he declined to go on with the case "only showed a proper regard for his own dignity." These are unpleasant remarks for Mr. Justice Hawkins, and the frank expression of judicial censure on a brother judge is probably unprecedented; but so also it may be hoped was the conduct which called it forth. When the judge, after his list had broken down at eleven o'clock in the morning, refused to wait a few minutes for counsel who was actually engaged in speaking in a neighbouring court, he showed most singular petulance, and he does not appear to have retrieved his dignity by the mode in which the trial was subsequently conducted. Good temper and patience are judicial attributes not too common in the present day, and Mr. Cock deserves the thanks of the profession for the lesson he has afforded, that there is a limit to the license of the bench.—*Solicitors' Journal*.

**SATISFACTION**, in which we largely share, is universally expressed at the honour of knighthood conferred upon the ex-Chief Justice of the Superior Court of Quebec. It is just five years since we ventured to suggest the fitness of such a distinction (4 Leg. News, 169). Three years later the Gen-

## FLOTSAM AND JETSAM—LAW SOCIETY OF UPPER CANADA.

Council of the Bar, in a formal resolution, made a similar recommendation (7 Leg News, 129). Since that time Chief Justice Meredith, to the great regret of the profession, has thought proper to claim the relief from official duties to which his long service upon the bench so fully entitled him (7 Leg. News, 289).

Sir William Collis Meredith was born in Ireland, 23rd May, 1812. He studied law in Montreal, and was called to the bar in 1836. Created a Q. C. in 1844. For some years he was head of the firm of Meredith, Bethune & Dunkin, which enjoyed a very large and important practice in the city of Montreal. He declined office on various occasions in the administrations of the time, but in December, 1849, accepted a judgeship of the Superior Court. On the 12th March, 1859, he was appointed to the Court of Queen's Bench, a position which he filled with marked ability. In 1866 he succeeded the late Chief Justice Bowen as Chief Justice of the Superior Court of Lower Canada, and continued in office until about two years ago, when the Government with great regret acquiesced in his desire for retirement. The decisions of the ex-Chief Justice have done much to build up the jurisprudence in force in this Province, and none are cited with greater deference in our courts. Sir William Meredith has received the hearty congratulations of his late colleagues on the well merited distinction conferred upon him, and we express simply the general feeling when we hope he may long be spared to enjoy the honours so worthily conferred.

## Law Society of Upper Canada.

## SUBJECTS FOR EXAMINATIONS.

*Articled Clerks.*

- |                      |   |  |
|----------------------|---|--|
| 1884<br>and<br>1885. | { | Arithmetic.                                |
|                      |   | Euclid, Bb. I., II., and III.              |
|                      |   | English Grammar and Composition.           |
|                      |   | English History—Queen Anne to George III.  |
|                      |   | Modern Geography—North America and Europe. |
|                      |   | Elements of Book-Keeping.                  |

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

*Students-at-Law.*

- |       |   |                                  |
|-------|---|----------------------------------|
| 1884. | { | Cicero, Cato Major.              |
|       |   | Virgil, Æneid, B. V., vv. 1-361. |
|       |   | Ovid, Fasti, B. I., vv. 1-300.   |
|       |   | Xenophon, Anabasis, B. II.       |
|       |   | (Homer, Iliad, B. IV.            |
| 1885. | { | Xenophon, Anabasis. B. V.        |
|       |   | Homer, Iliad, B. IV.             |
|       |   | Cicero, Cato Major.              |
|       |   | Virgil, Æneid, B. I., vv. 1-304. |
|       |   | Ovid, Fasti, B. I., vv. 1-300.   |

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

## ENGLISH.

A Paper on English Grammar. Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

## FRENCH.

A paper on Grammar,

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

## LAW SOCIETY OF UPPER CANADA.

## OF NATURAL PHILOSOPHY.

Books—Arnett's elements of Physics, and Somerville's Physical Geography.

*First Intermediate.*

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

*Second Intermediate.*

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Threescholarships can be competed for in connection with this intermediate.

*For Certificate of Fitness.*

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law, Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

*For Call.*

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission to the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchor, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six

## LAW SOCIETY OF UPPER CANADA.

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchler, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## F E E S .

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

## PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890.

*Students-at-law.*

## CLASSICS.

1886.	Cicero, Cato Major.
	Virgil, Æneid, B. I., vv. 1-304.
	Cæsar, Bellum Britannicum.
	Xenophon, Anabasis, B. V.
1887.	Homer, Iliad, B. VI.
	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. VI.
	Cicero, In Catilinam, I.
1888.	Virgil, Æneid, B. I.
	Cæsar, Bellum Britannicum.
	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. IV.
1889.	Cæsar, B. G. I. (vv. 133.)
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. I.
	Xenophon, Anabasis, B. II.
1890.	Homer, Iliad, B. IV.
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. V.
	Cæsar, B. G. I. (vv. 1-33)
1890.	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. VI.
	Cicero, In Catilinam, II.
	Virgil, Æneid, B. V.
1890.	Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

## MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

## ENGLISH.

A Paper on English Grammar. Composition.

Critical reading of a Selected Poem:—

1886—Coleridge, Ancient Mariner and Christabel.

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

## HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

## FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886 } Souvestre, Un Philosophe sous le toits.

1888 }

1890 }

1887 } Lamartine, Christophe Colomb.

1889 }

## or, NATURAL PHILOSOPHY.

Books—Arnot's Elements of Physics; or Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

## ARTICLED CLERKS.

Cicero, Cato Major; or, Virgil, Æneid, B. I., vv. 1-304, in the year 1886; and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, or Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe. Elements of Book-Keeping.

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.

# Canada Law Journal.

VOL. XXII.

JULY 1, 1886.

No. 13.

## DIARY FOR JULY.

1. Thur...Dominion Day. Long vacation H. C. J. and Sup. Court of Canada begins.
4. Sun...2nd Sunday after Trinity.
5. Mon...C. C. term begins, except in York.
10. Sat...C. C. term ends, except in York.
11. Sun...3rd Sunday after Trinity.
13. Tues...Quebec founded by Champlain. Sir John Robinson 7th C. J. of Q. B., 1829.
17. Sat...Law Society incorporated, 1797.
18. Sun...4th Sunday after Trinity. First Cunard steamer arrived at Boston, 1840.
22. Thur...Boundary dispute between Ont. and Man. settled by Privy Cl., 1884. W. H. Draper 9th C. J. of Q. B., 1863. W. B. Richards 3rd C. J. of C. P., 1863.
23. Fri...Act uniting Upper & Lower Canada assented to 1840.
25. Sun...5th Sunday after Trinity.
29. Thur...Wm. Osgoode, first Chief Justice of Q. B., 1792.

TORONTO, JULY 1, 1886.

FOLLOWING our usual course no second number will be issued during the vacation months of July and August.

THE *Central Law Journal* says that a lawyer in Georgia who had lost his cause was so impressed by the supernatural ignorance and stupidity (as he construed it) of the presiding judge that he made the appropriate affidavit, and sought to procure an inquisition of lunacy upon that judge. If the practitioner acted in good faith, and out of an honest desire to protect other litigants, would his action be a contempt of court? Sometimes, however, it is the judgment, and not the criticism upon it, that brings the court into contempt.

A SUPPLEMENT to "Hodgins on the Canadian Franchise Act, 1885," containing the amendments made last session to the Franchise Act, is in the press, and will be shortly issued by Mr. Hodgins. We also learn that a second edition of Mr. Hodgins' "Manual on Voters' Lists" is in course of preparation. The intricate classification of voters under the Ontario Legislative and Municipal Franchises proves the necessity for the early publication of such a manual.

A LEADING Queen's Counsel in large practice in one of our eastern cities writes us as follows: "I note what you say in No. 11 of current volume as to judicial awards, instead of judgments, and the apropos remarks from the English *Law Journal* at p. 205. I express the hope that you will, as you propose, find it 'well to refer to this subject more at length, as there would appear to be some ground of complaint.' In my opinion, there is great ground of complaint, and not only would you confer a benefit on the public by drawing attention to it, but indeed, I think it is your duty to do so." Another letter says: "I have read with pleasure your article in your issue for June 15. It is timely, to the point and required."

We have been requested by many to take up and deal with this question. It is more important than perhaps some of our judges realize; and the mind of the profession is very strong on the subject. We shall take opportunity to refer to the matter again. It would be well, however, to leave it until after vacation, that it may receive the attention which its importance demands. Much dissatisfaction has been expressed for some time past in reference to some of the matters connected with the judiciary referred to in our last two numbers. That there are many things that should and could be remedied cannot be denied. In a country where we have hitherto been so justly proud of our Bench, it is the desire of the profession that the evils which they notice should be remedied rather than that its high reputation should be injured, and its general standard of excellence in any way lowered.



## LIFE INSURANCE—FILING REPORTS.

AN important point of insurance law was recently decided by the English Court of Appeal in *Canning v. Farquhar*, 54 L. T. N. S. 350. An application was sent to an insurance office for an insurance on the life of the applicant, setting out the state of his health and other matters, and declaring that all the statements in the application were true, and were to be the basis of the contract. The applicant was examined by the medical officer of the company, and the company then wrote to the applicant accepting the proposals, stating the amount of premium, and adding, "no insurance can take place until the first premium is paid." Before the first premium was paid the applicant met with an accident which resulted in his death. After the accident, but before the applicant's death, the premium was tendered in his behalf, but on the person making the tender informing the company of the accident, the company refused to accept the premium, and the next day the applicant died: the action was then brought by the administrator of the deceased applicant's estate for breach of the agreement to insure. But it was held by the Court of Appeal that the action was not maintainable; and the fact of there being an alteration in the risk between the date of the application for the insurance and the tender of the premium was held to justify the insurance company in refusing to accept the premium. The case was unique, and (as Lord Esher remarks) no case is to be found in the books in which such an action had ever been previously brought. The Court was unanimous that there was no concluded contract until the premium had been paid and accepted. Lord Esher even went so far as to say that, until acceptance of the premium, the insurers might at any time change their minds and refuse to insure, without assigning any reason, but in this view the Court cannot be said to have been agreed. Their

are also other *dicta* of Lord Esher in his case which are important expressions of opinion. According to his view it is necessary that the statements of fact in a proposal for life insurance must be true, not only at the time they are made, but also at the time the first premium is paid, and if any alteration takes place in the meantime, the alteration must be made known to the insurers, otherwise there would be a concealment of facts which would avoid the policy.

## FILING REPORTS.

As we fully anticipated, Rule 599 has been found to be a source of great practical inconvenience and expense to suitors, and has, besides, imposed on the accountant and his clerks great additional trouble and responsibility, without, as it appears to us, any adequate benefit to the public.

Under the former practice in Chancery, all reports were filed at Toronto, no matter where the suit was commenced, or where the proceedings were carried on. For over thirty years, this practice was found to work satisfactorily and smoothly, and there was never any doubt as to the proper place to file a report; the mere production of the report, showing that it had been filed in the office at Toronto, being of itself sufficient to show that it had been filed in the proper office.

Under Rule 599, all this is changed. Owing to proceedings in actions being frequently carried on in different offices, it has been necessary to give a technical construction to the provision of Rule 599, requiring the report to be filed in the office where the proceedings are "carried on." This technical construction has led to some curious and apparently incongruous conclusions. It has been assumed that it was the intention of the Rule to require

## FILING REPORTS—RECENT ENGLISH DECISIONS.

the report to be filed wherever the writ issued, and proceedings are deemed to be carried on there, though, as a matter of fact, they may be carried on hundreds of miles away.

For example, a writ may issue in Toronto, but the reference in the action may be directed to Sarnia or Cornwall, and all the substantial matters in litigation may be carried on in the office of the Master at one or other of those places, and yet according to the technical construction placed on the Rule, the proceedings are "carried on" in Toronto, and the report must be filed there.

But when an action is commenced by a motion in Chambers in Toronto, a still more curious result is reached. Assume the reference to be directed to Sarnia. Here we may have three offices to select from in which to file the report. There is the office of the Master in Chambers in Toronto, there is the office of the Master at Sarnia, and the office of the Local Registrar at Sarnia to choose between; but according to the judicial construction of the Rule in question, in neither of these offices would it be proper to file the report, because here another technical construction of the Rule comes in to play, and by analogy to actions commenced by writ, it is considered that such actions should be deemed to have been carried on at Toronto, and the report should be filed in the office where pleadings would have been filed if a writ had issued, and therefore, in such cases the report should be filed in the office of the Registrar, when the action is in the Queen's Bench or the Common Pleas Divisions, and in the office of the Clerk of Records and Writs when the action is in the Chancery Division; although in neither of these offices has any proceedings been actually "carried on."

Again there are cases where an action is commenced by writ issued by a Local Registrar, and a reference is directed to

the Master in the same county. In such cases the report must be filed in the office of the Local Registrar; but if an action is commenced by a motion in Chambers to the same Master, and he directs a reference to himself, the report in that case must be filed in the Master's own office.

No wonder with all these complications mistakes are constantly arising, and reports are being filed in the wrong office, and delay and expense is incurred in rectifying the mistakes. It is greatly to be wished that the judges may see their way at an early day to revert to the simpler practice of the Court of Chancery by rescinding Rule 599, and directing reports to be filed in all cases in the office of the Registrars of the Queen's Bench and Common Pleas Divisions; or the office of the Clerk of Records and Writs, according as the action is in the Queen's Bench, Common Pleas or Chancery Divisions.

## RECENT ENGLISH DECISIONS.

The Law Reports for June comprise 17 Q. B. D. pp. 1-138; 11 P. D. pp. 53-69; 32 Chy. D. pp. 1-246; 11 App. Cas. pp. 93-231.

## ALIEN—PERSONS BORN IN HANOVER BEFORE ACCESSION OF QUEEN VICTORIA.

Proceeding first to the consideration of the cases in the Queen's Bench Division, the first to be noticed is *In re Stepney Election*, 17 Q. B. D. 54, which, although an election case touching the right of certain persons to vote, is yet of general interest as casting light on the law affecting aliens. The question for the Court was, whether certain persons born in Hanover before the accession of Queen Victoria to the throne of Great Britain, and while the King of England was also King of Hanover, continued to be British subjects after Her Majesty's accession, and the Court held that they did not; and, while fully accepting the actual decision in *Calvin's case*, Co. Rep. Part vii. p. 1, yet certain *dicta* in that case which favour the notion that

## RECENT ENGLISH DECISIONS.

in such circumstances there is a right in the subject to make an election, as to which country he will continue a subject of, were dissented from, the Court being of opinion that allegiance is, in the language of Lord Coke, "*Duplex et reciprocum ligamen*," which the subject cannot by his mere election divest himself of.

**SEDUCTION—PLEADING—ALLEGATION AS TO PROCURING ABORTION—APPLICATION TO STRIKE OUT PARAGRAPH.**

In *Appleby v. Franklin*, 17 Q. B. D. 93, the defendant applied to strike out from the statement of claim in an action for seduction of the plaintiff's daughter, an allegation that the defendant had administered noxious drugs to the daughter for the purpose of procuring abortion. The application was based on the ground that the allegation in question disclosed the commission of a felony for which the defendant ought first to have been prosecuted. But it was held by a Divisional Court (Huddleston, B. and Wills, J.) following *Osborn v. Gillett*, L. R. 8 Ex. 88, that the application could not be granted, inasmuch as the plaintiff was not the person upon whom the felonious act was committed, and had no duty to prosecute.

**DISCOVERY OF DOCUMENTS—SUFFICIENCY OF AFFIDAVIT.**

In *Nicholl v. Wheeler*, 17 Q. B. D. 101, which was an action for the recovery of land, the Court of Appeal, following *Jones v. Monte Video Gas Co.*, 5 Q. B. D. 556, and *Hall v. Truman*, 29 Chy. D. 307, refused to permit interrogatories to be administered for the purpose of contradicting the defendant's affidavit which alleged that certain documents were privileged from production on the ground that they supported his title, and did not contain anything impeaching his defence, or supporting the plaintiff's case.

**ARBITRATION—APPLICATION TO EXTEND TIME FOR MAKING AWARD—C. L. P. ACT, 1854, s. 15—(R. S. O. c. 50, s. 219.)**

An attempt was made, in *re Mackenzie*, 17 Q. B. D. 114, to induce a Divisional Court (Grove and Stephen, JJ.) to enlarge the time for making an award under the following circumstances: By a Local Government Act passed subsequent to the C. L. P. Act, 1854, provision was made for referring certain matters to arbitration; but the Act expressly provided that the time for making an award under the Act

"shall not in any case be extended beyond the period of two months from the date of the submission," this time had elapsed, and it was held that the provisions of the Common Law Procedure Act, 1854, s. 15, would not authorize an enlargement of the time.

**MASTER AND SERVANT—EMPLOYERS' LIABILITY ACT—(49 VICT. c. 28 ONT.)**

*Webbin v. Ballard*, 17 Q. B. D. 122, is a case under the Employers' Liability Act, from which the 49 Vict. c. 28 (O.) was taken. The action was brought by the widow of a deceased person who had been employed as a fireman in the defendant's brewery. In the engine room, at some distance from the floor, was a valve to turn on steam to a donkey engine. This valve could only be reached by means of a ladder placed against a lower pipe, but by reason of a bend in this pipe the ladder (though in itself perfect), being without hooks or stays, was unsafe for the purpose for which it was used. The defendant had himself seen the ladder so used. The deceased was found dead in the engine room, having been apparently killed in consequence of the ladder slipping while he was upon it. A verdict having been found for the plaintiff, the defendant moved for a new trial, on the ground that there was no evidence of a defect in the plant, for which the defendant would be liable under the Act; that the accident arose from the improper use of the plant, and that the deceased was guilty of contributory negligence. The motion was refused. The Court (Mathew and A. L. Smith, JJ.) points out that the Act has practically swept away the defences of "common employment," and "that the servant had contracted to take upon himself the known risks attendant upon the employment," which were previously open to an employer when sued by his servant for injuries sustained in the course of his employment, and that a servant or his representative suing under the Act, is now virtually in the position of any one of the public. But while of opinion that the two defences above mentioned are taken away from the employer, the Court was of opinion that the Act gave him a defence which did not theretofore exist when sued for a defect in the ways, plant or machinery, viz., that the servant knew of the defect and did not communicate it to the employer, or to some other person superior to

## RECENT ENGLISH DECISIONS.

himself in the service of the employer. On the question of want of evidence of defect in the plant, the Court came to the conclusion that although the ladder was perfect in itself it was not in a proper condition for the purpose for which it was used, and that therefore there was evidence of a defect in the condition of the ways or plant within the meaning of the Act. The mere fact that the deceased knew that the ladder was dangerous, was held not to be evidence of contributory negligence on his part, though it would have been otherwise if it had been shown that he had used the ladder in a negligent manner; and the fact that the defendant knew of the defect was held to exonerate the deceased from giving information to the defendant of the defect.

## JURISDICTION—APPEAL FROM MASTER IN CHAMBERS.

*Bryant v. Reading*, 17 Q. B. D. 128, we think deserving of notice for the observations of Lord Esher which we quote below. On an interpleader summons the Master in Chambers had decided, at the request of one of the parties, to dispose of the matters in dispute in a summary way. The claimant objected that an issue should be directed, and appealed to a judge in chambers, who dismissed the appeal on the ground that the decision of the Master was final. An appeal to a Divisional Court was dismissed, and an appeal to the Court of Appeal was also dismissed on the ground that the decision of the Master, being a summary decision, was not the subject of appeal under *Waterhouse v. Gilbert*, 15 Q. B. D. 569. But Lord Esher, in giving judgment, doubted the propriety of the decision of the Divisional Court, and made use of the following observations :

One point which seemed to be raised was whether there was an appeal from the Master to the Judge in Chambers. This depends on the interpretation of two rules, 8 and 11 of Ord. 57, and two rules, 12 and 21 of Ord. 54. Order 57 r. 8 is this : "The Court or a judge may, with the consent of both claimants, or at the request of any claimant, if, having regard to the subject-matter in dispute, it seems desirable to do so, dispose of the merits of their claims and decide the same in a summary manner, and on such terms as may seem just;" and Rule 11 of the same Order declares when such decision is to be final. Now, it is argued that, inasmuch as by Ord. 54 r. 12, the Master has the

authority and jurisdiction of a judge at chambers, interpleader not being one of the matters excepted in the rule, his decision, like that of the Court or a judge, is not open to appeal. I think this argument may well be contested on the ground that the order which deals with the decision of a Court or judge, and makes that decision final and conclusive, does not apply to the decision of a Master. Order 54 r. 12 gives the Master the authority and jurisdiction of a judge in such cases; but that does not make his decision that of a Court or a judge while Rule 21 of the same Order is explicit that any person affected by any order or decision of a Master may appeal therefrom to a judge at chambers.

## PUBLICATION OF ADVERTISEMENTS—CONTEMPT OF COURT.

In *Brodrib v. Brodrib*, 11 P. D. 66., a co-respondent in a divorce suit, immediately after the service of the citation, caused advertisements to be published denying the charges made in the petition, and offering a reward of 100 guineas "for such information as will lead to the discovery and conviction of the instigators of such charges." Upon motion of the plaintiff it was adjudged that the publication of the advertisements was a contempt of court, as tending to deter witnesses from coming forward, and an attachment was ordered; but the writ was allowed to remain in the registry for a fortnight to enable the respondent to make a proper apology; and on an affidavit of the co-respondent being subsequently produced disclaiming any intention to interfere with the course of justice, and expressing his regret, the attachment was rescinded on payment of costs.

## VENDOR AND PURCHASER—CONDITIONS OF SALE—RESCISSION OF CONTRACT.

In *re Terry and White*, 32 Chy. D. 14, the first of the cases in the Chancery Division to which we direct attention, was an application under the Vendors and Purchasers Act. A parcel of land, described in the particulars of sale as containing 4 a. 3 r. 37 p., was sold by auction subject to special conditions of sale, one of which stated : "3. Each lot is believed, and shall be taken to be correctly described as to quantity and otherwise . . . and the respective purchasers . . . shall be deemed to buy with full knowledge of the state and condition of the property as to repairs and otherwise, and no error, misstatement or mis-

## RECENT ENGLISH DECISIONS.

description shall annul the sale; nor shall any compensation be allowed in respect thereof." The conditions also provided for the delivery of objections by the purchaser to the title, "or on the particulars or conditions of sale" within a limited time, and further provided that "7. If any purchaser shall insist on any objection or requisition which the respective vendors shall be unable, or on the ground of expense, or otherwise unwilling to answer, comply with, or remove, the vendors may at any time, and notwithstanding any intermediate or pending negotiations, proceedings or litigation, annul the sale." The abstract having been delivered, the purchaser by his requisition objected that the parcel in question contained, as was the fact, only 3 a. 1 r. 37 p., and claimed compensation for the deficiency. The misstatement in the acreage had been innocently made, the vendor refused compensation, but offered to annul the sale. The purchaser refused to withdraw his requisition or to consent to a rescission of the contract, and thereupon the vendor gave notice of annulment of the sale pursuant to the seventh condition. The purchaser then took proceedings under the Vendors and Purchasers Act to compel specific performance with compensation. Bacon, V. C., was of opinion that the vendor could not annul the sale; but the Court of Appeal arrived at the opposite conclusion, it being clear that though the vendor could not have specifically enforced the contract, except on the terms of giving compensation for the defect, yet where the purchaser himself was seeking specific performance the Court would not, under the conditions of sale, order the vendor to make compensation for the deficiency. The judgments of the Master of the Rolls and Lindley, J., are noteworthy for the vigorous protest they contain against the idea that the same contract can be differently construed in a Court of Law and in a Court of Equity.

## SOLICITOR—TAXATION—THIRD PARTY LIABLE TO PAY.

*In re Allingham*, 32 Chy. D. 36, the Court of Appeal held that a trustee, on bankruptcy of a mortgagor, is entitled to an order to tax the bill of costs of the solicitor of the mortgagee incurred in selling the mortgaged premises under a power of sale.

## LUNATIC—MAINTENANCE.

The Court of Appeal, *In re Tuer*, 32 Chy. D. 39, decided that the Chancery Division in giving directions for the maintenance of persons of unsound mind not so found, has power to direct capital as well as income to be applied for that purpose.

## COMPANY—VOLUNTARY WINDING UP—INJUNCTION.

*In Gooch v. London Banking Association*, 32 Chy. D. 41, an injunction was granted by Pearson, J., on the application of a lessor of a company in voluntary liquidation, to restrain the distribution of the assets of the company among its shareholders, without first setting aside sufficient assets to provide for the payment of future accruing rent and other liabilities under the lease; and an appeal from this decision was compromised.

## MORTGAGOR—MORTGAGEE—RECEIPT OF RENTS AND PROFITS.

*Noyes v. Pollock*, 32 Chy. D. 53, was a mortgage action. An agent of the mortgagor received the rents of the mortgaged property for him and applied them in payment of the interest to the mortgagees. The mortgagees wrote to this agent enclosing notices to the tenants to pay the rents to them, which the agent was instructed to serve on them if the mortgagor should attempt to interfere. The agent replied, promising to pay the rents to the mortgagees and not to the mortgagor, which he did, and the notices were not served on the tenants. Pearson, J., held that on this state of facts the mortgagees were chargeable as mortgagees in possession, but on appeal this decision was reversed. In the same case another point was determined. A married woman having an interest in certain property joined with her husband in mortgaging it along with other property of his own. Afterwards the latter property was sold by the husband, the mortgagees joining, and the purchase money was applied partly in reduction of the mortgage debt, and the balance was paid to the husband, the wife acquiescing though not joining in the transaction. The Court of Appeal (affirming Pearson, J.) held, under these circumstances, the wife had no equity to charge the mortgagees with the moneys paid to her husband.

## RECENT ENGLISH DECISIONS.

EXPROPRIATION OF LAND—COLORABLE PURPOSE—  
INJUNCTION.

In *Lynch v. Commissioners of Sewers*, 32 Chy. D. 72, the Court of Appeal held that the plaintiff was entitled to an interlocutory injunction restraining the defendants from proceeding with the expropriation of the plaintiff's property, it being shown that there was a question to be tried at the hearing, whether the defendants were not seeking to expropriate the land in question colorably for a purpose authorized by statute, but really to effect an object for which they were not authorized to expropriate it.

DISENTAILING DEED—INEFFECTUAL BAR OF ENTAIL  
(R. S. O. c. 100, s. 30)—VOLUNTEERS.

The case of *Green v. Paterson*, 32 Chy. D. 95, although one relating to a copyhold estate, nevertheless is of use as throwing light on a branch of real property law. A married woman, being entitled to an equitable estate tail in copyholds, executed a post-nuptial deed in February, 1870, declaring that such estate should be held in trust for such persons as she and her husband should jointly appoint, and in default for herself in fee. The deed was duly acknowledged but not entered on the court rolls within six months after execution, as required by the *Fines and Recoveries Act*. By a deed made in March, 1870, she and her husband purporting to exercise this joint power appointed the copyholds in question, and covenanted to surrender them to trustees upon trust to sell, invest the proceeds and hold the land (in the events which happened) for her, for her separate use for life, then for her husband for life, and then for her children other than her eldest son. No sale or surrender of the copyholds was ever made. The husband and wife both died, leaving several children. The trustee of the settlement then petitioned for an order vesting in him all the estate of the eldest son and customary heir, who was an infant, and Hall, V.C., granted the order in April, 1881, and it was from this order that the eldest son appealed by leave of the court; and on the appeal the order of Hall, V.C., was reversed, the Court holding that the deed of February, 1870, was not a "disposition" within the *Fines and Recoveries Act*, but a mere declaration of trust, and therefore, and also on the ground of not being entered on the

court rolls within six months after execution, (see R. S. O. c. 100, s. 30), was void, and inoperative to bar the entail. It was also held by the Court of Appeal that the settlement of March, 1870, being post-nuptial, the children of the settlor were merely volunteers, and therefore, were not entitled to enforce its provisions as they would have been in the case of an ante-nuptial settlement. Speaking of the settlement, Lindley, L.J., says:

Those children were not parties to that contract, and *prima facie*, no person who is a stranger to a contract can sue to enforce it. But upon that general rule there is, as is well known, this exception grafted, that children, born of the marriage in contemplation of which a settlement has been executed, are treated to a certain extent as if they were parties, and they are allowed to sue for the execution of that settlement. It appears to me, that in the case of a post-nuptial settlement that rule cannot apply. The consideration of marriage is not infused into that settlement. It is made for considerations which arise after the marriage, and, therefore, in point of principle, I am unable to see how the exception which applies to an ante-nuptial settlement, giving children of the marriage a right to sue for the performance of those covenants, can apply to post-nuptial settlements.

The application for the vesting order was held to be virtually a motion to enforce the settlement on behalf of the beneficiaries, and the order of Hall, V.C., was therefore vacated.

PRACTICE—SERVICE OUT OF JURISDICTION—(R. S. O.  
c. 40, ss. 93, 94.)

In *re Busfield, Whaley v. Busfield*, 32 Chy. D. 123, the Court held, (affirming the decision of Chitty, J.,) that the court cannot order service of an originating summons out of the jurisdiction. It was contended by the appellant that the former jurisdiction of the Court of Chancery, under 2 W. IV. c. 33; 4 & 5 W. IV. c. 82, was continued under the Judicature Act. These Acts had been repealed, but one of the repealing Acts provided that the repeal effected by the Act should not affect any jurisdiction established or confirmed by the repealed Act. But the Court of Appeal held that the Judicature Rules established a complete code of cases in which the jurisdiction of the court might be exercised against persons out of the jurisdiction, and extended only to cases in which a writ was issued, except where it was merely necessary to notify a party of proceed-

## RECENT ENGLISH DECISIONS—SELECTIONS.

ings, as distinguished from exercising any jurisdiction over him. The procedure in this Province is different from the English in this respect: the latter requires an order authorizing service out of the jurisdiction before the service is effected; in this Province the service is effected, and an order must then be obtained for its allowance. This case appears to be an authority on a motion for allowance of a service effected abroad, and it may hereafter become a question whether the Ontario Rules have had the effect of superseding the provisions of R. S. O. c. 40, ss. 93, 94. We are inclined to think that, there having been no express repeal of this statute, it would be held that the practice under it has been preserved.

## VENDOR AND PURCHASER—EXPROPRIATION—POSSESSION.

*Bygrave v. Metropolitan Board of Works*, 32 Chy. D. 147, is a case from which it appears that where a public body has power to expropriate and take possession of lands it must do so in the manner pointed out by the statute, and that the Court has no jurisdiction in a suit, by analogy to the procedure provided by such Act, to make an order for delivery of possession otherwise than according to the usual course of the Court. The plaintiff in the action, being lessee of the premises in question, which were required by defendant for a street improvement, contracted to sell them to the defendants. The latter subsequently found that the lease was terminable at the option of the lessor at the end of seven, or fourteen years, whereupon the defendants claimed an abatement in the purchase money, which the plaintiff refused, and brought the action for specific performance. The defendants applied *pendente lite* for an order for delivery of possession on payment into Court of the whole purchase money claimed by the plaintiff; Pearson, J., made the order, but it was reversed by the Court of Appeal.

## SELECTIONS.

## LIBELLING A WIFE.

All along the line of English speaking and common law peoples there has been a steady improvement in the legal status of married women, but it seems that, in some respects, the old original mother country lags behind the rest of the family. The *Solicitor's Journal* of London, in a recent issue, comments upon a ruling which well illustrates this proposition. It seems that the parties in question after living together as man and wife separated, and the woman supported herself by her own labour as a vocalist. The man published what, for the purposes of the case, was conceded to be a defamatory libel, to the effect that the woman was not his wife at all, but had been his mistress. She applied for a rule for a criminal proceeding against her husband for the libel, but the Court discharged the rule upon the ground that a criminal proceeding for libel is not "a proceeding for the protection and security of the separate property" of the wife, and that this latter was the only "proceeding" which, under existing laws, a wife can institute against her husband. The "fair fame" of the applicant was not, according to the ruling of the learned judges, her "separate property," nor indeed does it appear that they considered it property at all. Shakespeare says, it is "the immediate jewel of our souls," but whether Shakespeare is authority in English Courts we cannot presume to say. Certain it is, that in its most prosaic sense "fair fame," is recognized by the Courts as property, for of the good will of a business, which is fully recognized as property, the good character of the tradesman is the most valuable and indispensable constituent. *A fortiori* is this the case when a woman is engaged in business. A milliner's trade may be ruined by charges, not that she makes "frightful" bonnets, but that she is personally impure; a school-room

## SELECTIONS.

would be promptly denuded of its pupils by a like charge against the school-mistress.

These self-evident propositions do not seem to have occurred to the English judges in the case under consideration. In defining the words "separate property" they limit their meaning to the actual tangible material chattels. The silks, and ribbons, and laces, in the case of the milliner; the piano and the harp, the globes and the black-board, in the case of the school-mistress, constitute the separate property, and *all of it*. The fair fame which secures customers to one of these business women, and the confidence of parents and guardians to the other, seems to be ignored as too evanescent and immaterial for judicial cognizance.

There is a further ruling which is, at the least, questionable. If the wife had any remedy against the husband, which is *not* conceded, it must be a civil remedy, because the law gives her only a remedy against the husband for the "protection and security" of her separate property, and a criminal proceeding for libel cannot be regarded as such a remedy, for it is designed only to punish the offender, not to protect and secure the party injured. This idea brings us back to first principles. What is the object of punishing crime?

Not to revenge certainly, but the prevention of like offences in the future. "My Lord," said a prisoner, "you surely won't hang me for only stealing a sheep?" "Not at all," replied the judge, "but only that sheep may not be stolen." The husband in this case might well have been punished for libelling his wife, so that he should do so no more, which would tend at least partially to secure and protect the wife's separate property in her good name, as well as deter other husbands from committing the like crime.

It appears therefore, that it is the law in England that a married woman living with her husband may, with him, prosecute any person who libels her; if her husband has abandoned her, she may prosecute any person who has libelled her *except him*, and that he after withdrawing his protection from her, may say anything against her he chooses, no matter how false, calumnious and disgraceful; he may say such things orally, or in writing, or in print; he may say them every day of his

life as long as he may live, and he may thus drive her to starvation, beggary and shame, and for this the law gives her no remedy and inflicts no punishment on him.

If this is the net result, in this respect, of the recent woman law legislation of England, it is very manifest that the mother country is yet very far from having done justice to woman.—*Central Law Journal*.

## RELEVANCY OF EVIDENCE.

*Evidence must Tend to Prove Issue.*—

The most fundamental rule of evidence is that the evidence adduced must be confined to the matter in dispute. Relevancy is the term applied to evidence that tends to prove the issue; and whether evidence is admissible or not, or is relevant, is a question for the Court. Mr. Stephen makes relevancy a sole test of admissibility, but in this conclusion he is undoubtedly incorrect. A communication by a client to his legal adviser would be highly relevant, but none the less inadmissible.

It is not necessary that the evidence bear directly upon the point in issue. If it constitutes a link in the chain of proof, or tends to prove the issue, it is sufficient, although considered alone it might not justify a verdict. Neither is it essential that its relevancy appear when the evidence is offered. If it will be afterward rendered material by other evidence it may be admitted. If not subsequently connected with the issue, it may be taken from the consideration of the jury. If the order in which the evidence is admitted is discretionary with the judge, no exception lies from an exercise of such discretion.

*Criminal Cases.*—More breadth in the introduction of testimony is allowed in criminal than in civil cases. For instance, in criminal cases, the defendant is permitted to offer evidence of good character. This is apparently an exception to the rule requiring the evidence to be confined to the point in issue. Evidence of good character can in no way affect the question as to whether A. did a certain act. The cases go upon the ground that if a strong case is made out against the defendant, evidence of good character will not avail; it is only in doubtful cases



## RECENT ENGLISH DECISIONS—SELECTIONS.

ings, as distinguished from exercising any jurisdiction over him. The procedure in this Province is different from the English in this respect: the latter requires an order authorizing service out of the jurisdiction before the service is effected; in this Province the service is effected, and an order must then be obtained for its allowance. This case appears to be an authority on a motion for allowance of a service effected abroad, and it may hereafter become a question whether the Ontario Rules have had the effect of superseding the provisions of R. S. O. c. 40, ss. 93, 94. We are inclined to think that, there having been no express repeal of this statute, it would be held that the practice under it has been preserved.

## VENDOR AND PURCHASER—EXPROPRIATION—POSSESSION.

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## LIBEL

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The *Solicitor* cent issue, co well illustrate that the part gether as ma woman sup labour as a what, for t conceded to effect that all, but ha plied for a against her Court disc that a crim "a proce security of wife, and "proceed a wife ca The "fair according judges, deed do it proper "the in whether lish Co Certain "fair t as prop ness, w the go most tuent. woma trade she n she i

jection t do a or is of eral ad- dmitted olves the or goes nce, the arly irre- contract. re are one e rule re- ned to the ust appears matters of l to testify e knowledge he result of ts similar to nles are well ony upon the ction for libel f the plaintiff he weight of nce may cor- n an action for age the rule is ental state of a e of acts similar bject of the ac- t shows the state n. This rule is lent transactions. a similar nature r fraudulent intent. ts is sometimes t strictly bearing

g purchased it out and out. The  
formerly had sold tea on commis-  
V., but now purchased, as he said, to  
by-law. The conviction alleged  
defendant was the agent of P. W., of  
of London, but did not allege that  
ndant had not the necessary license  
e him to do the act complained of.

that inasmuch as the defendant was,  
ing to the evidence, an independent  
and not an agent, he did not come  
the provisions of Con. Mun. Act, 1883,  
95, sub-sec. 3, nor within 48 Vict. cap.  
5).

ld, also, that the conviction was insuffi-  
in not stating that P. W. was "not resi-  
within the county," and that the expres-  
"of the city of London" was insufficient.  
eld, also, that it was improper to compel  
defendant to give evidence against him-  
f.

eld, also, that the possession of a license  
a matter of defence, and not of proof for  
e prosecution.

Held, also, that the intention to evade the  
y-law was immaterial, so long as the agency  
did not in fact exist.

Upon these and other grounds the order to  
quash the conviction was made absolute.

Clement, for the motion.

H. J. Scott, Q.C., contra.

Galt, J.]

REGINA V. MCCARTHY.

*Amending conviction—Plea of guilty to defective  
information.*

The convicting magistrate may amend his  
conviction at any time before the return of the  
certiorari, and the Court refused to quash  
because there had been a conviction pre-  
viously returned which was bad, especially as  
this had not been filed.

The objection that the defendant has  
pleaded guilty to a defective information is,  
under 32-33 Vict. ch. 31, sec. 5 (D), not ad-  
missible.

H. J. Scott, Q.C., for motion.

Aylesworth, contra.

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div

## CHANCERY DIVISION.

Proudfoot, J.]

[April 28.]

## PLATT V. THE GRAND TRUNK RY. CO. OF CANADA.

*Covenant for quiet enjoyment—Covenant for title—Breach—Damages—Set off of arbitration damages—Different causes of action—Mortgagees—Parties.*

On February 3rd, 1873, the company granted to A. T. P. (through whom S. P., the original plaintiff in this action, claimed) a certain mill site on the River Maitland, with certain easements, one of which was the right to erect a dam across the river, high enough to take up eight feet of the fall of the river, the location of the dam being defined by the deed, and covenanted that they had the right to convey and for quiet enjoyment. The company had previously granted (without reserving any of the easements granted to A. T. P.) an island in the river, called "Island C.," and two parcels of land, one on each bank immediately opposite to each other, and adjoining the property of the plaintiff, called respectively "The Grant Meadow" and "Block F.," all three of which were above the land granted to A. T. P., and subsequently became the property of H. T. A. In an action by S. P., who died after action brought, M. A. P. was made plaintiff by order of revivor against the company, it was alleged and proved that a dam could not be maintained across the river high enough to take up eight feet of the fall of the river without submerging a great part, if not the whole, of "Island C.," and penning back water and ice on "The Great Meadow" and "Block F.," and encroaching upon the rights of H. T. A. as riparian proprietor of the said lands. It was contended on the part of the defendants that the mortgagees of the property should be made parties.

*Held*, that O. J. A. sec. 17, sub-sec. 5, enables a mortgagor entitled to the possession of land as to which the mortgagee has given no notice of his intention to take possession, to sue, to prevent, or recover damages in respect of any trespass or other wrong relative thereto in his own name only, and that the objection for want of parties ought not to prevail.

*Held*, also, that in an action on a covenant for quiet enjoyment a plaintiff must show an interruption, or obstruction of the easement, in order to entitle him to recover, and that S. P. not having attempted to enjoy his easement by building a dam in the place and manner specified, and been interrupted, he could not succeed on the covenant for quiet enjoyment.

*Held*, also, as to the covenant for title, that as the Supreme Court had decided in *Platt v. Attrill*, 10 S. C. R. 425, that the company had no right to grant the easement to A. T. P., that decision was binding here, although the company were not parties to the suit and that the covenant was broken as soon as it was made, and the plaintiff entitled to such damages as accrued during the life of S. P., and following *The Empire Gold Mining Co. v. Jones*, 19 C. P. 245, that the damages would be the value of the estate that had passed, and that which the deed purported to convey, and the company covenanted they had the right to convey. It appeared that during S. P.'s ownership the government had constructed a breakwater at the mouth of the river, and that S. P. had been awarded damages "on account of the penning or damming up of the waters by the construction of the breakwater, and forcing them back on S. P.'s property," and on another account not material to this action.

*Held*, that as the sum awarded was a lump sum for both accounts together, and as the evidence on the arbitration showed that the breakwater only affected S. P. to the extent of three feet of water, leaving him a fall of five feet, the value of which could only be ascertained by a reference, and as the subjects of the arbitration and the action on the covenant were not the same, the company are not entitled to set off the money recovered from the government against their liability for damages for their breach of contract.

*Held*, also, that the registration of the previous conveyances, even if that was notice, was no bar to a recovery on the covenant. The plaintiff, therefore, was held entitled to damages for breach of the covenant for title, and a reference was directed.

*MacLennan*, Q.C., and *M. G. Cameron*, for the plaintiff.

*S. H. Blake*, Q.C., *Cassels*, Q.C., and *Garrow*, Q.C., for the defendants.

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

Boyd, C.]

[June 12.]

## GEMMILL V. GARLAND.

*Copyright—Notice of entry—38 Vict. c. 88 (D.),  
secs. 9, 17.*

The writer of a book printed the book which he intended to copyright with notice therein of copyright having been secured, although he had not at the time actually taken the steps to obtain copyright. He, however, did this merely in anticipation of applying for copyright, which he subsequently applied for and obtained. Furthermore, it appeared to be sanctioned by the practice at the office at Ottawa, and there was no publication of the book till after the statutory title of the author was complete.

*Held*, that this did not constitute an infringement of sec. 17 of the Act respecting copyrights, 38 Vict. ch. 88 (D.).

On the title page of the book as published the plaintiff caused these words to be printed: "Entered, according to Act of Parliament, in the year 1883, by J. A. Gemmill, in the office of the Minister of Agriculture at Ottawa."

*Held*, that this was a sufficient compliance with sec. 9 of the said Act, although the form of words used was not exactly the same as these prescribed, the divergencies being immaterial.

*Christie*, for the plaintiff.

*W. Cassels*, Q.C., for the defendant.

Proudfoot, J.]

[June 16.]

## WOOD V. ARMOUR.

*Will—Construction—Intestacy—Blended fund—  
Distribution per capita.*

A testator directed his executors to pay his debts, funeral expenses and legacies therein after given out of his estate, and proceeded: "My executors are hereby ordered to sell all my real estate, after the payment of my just debts and funeral expenses, and all my property and personal effects, money or chattels are to be equally divided between my children and their heirs—that is, the heirs of my son G., and daughter S., now deceased, and my son J., Mary and Hannah, or their heirs. Should any of my said heirs not be of age at

my death, my executors are to place their legacies in some of the banks of Ontario until the said heirs are of age."

*Held* (1) That there was no intestacy either of the real or personal estate. It is to be presumed that the testator did not intend to die intestate, and the language shows he did not intend his heirs to take his property as real estate, as he peremptorily directs a sale, makes an actual conversion of it into money, thus blending the real and personal property into a common fund, and then bequeaths it all to the legatees.

(2) That the persons entitled to share under the will took per capita and not per stirpes, upon the same principle as in the case of *Abrey v. Newman*, 16 Bab. 431. Where the gift is to the children of several persons they take per capita and not per stirpes.

(3) That the grandchild of G. was not entitled to a share, the children of G. taking in their own right and not in a representative capacity.

*W. R. Meredith*, Q.C., for the plaintiff.

*R. M. Meredith*, for the executor and two grandchildren.

*Harcourt*, for the infants.

Proudfoot, J.]

[June 16.]

## FOSTER V. RUSSELL.

*Contract—Specific performance—Uncertainty—  
Security.*

One F., a bookkeeper and accountant, entered into the following agreement with the firm of R. & Co. The agreement was in the form of a letter addressed to the plaintiff, and worded thus: "In consideration of your advancing us the sum of \$3,000, we agree to give you collateral security and to pay you interest on same at rate of eight per cent. per annum." The plaintiff advanced money for the benefit of the firm of R. & Co., but before he had received any security the firm made an assignment for the benefit of creditors. The plaintiff now sought to have it declared that he had a lien on the assets and effects of the firm, real and personal, and to have them assigned to him.

## Chan. Div.] NOTES OF CANADIAN CASES—ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

*Held* (1) that the agreement was incapable of specific performance by the court for the reason that the terms were too vague and uncertain to be entertained. No kind of security was specified in the agreement, and parol evidence could not be given to supply the defect. The plaintiff was, however, entitled to have judgment at law against the firm of R. & Co. for the \$1,900, and interest and costs of action.

*De Gear v. Smith*, 11 Grant, 570. followed.

Proudfoot, J.]

[June 17.

RE BRITON MEDICAL AND GENERAL LIFE ASSOCIATION (2).

*Foreign corporation—Deposit with Minister of Finance*—31 Vict. c. 48 (D.)—34 Vict. c. 9 (D.)—*Constitutional law*.

Canadian policy-holders petitioned for distribution of the deposit made by the above company, a foreign corporation, with the Minister of Finance, under 31 Vict. c. 48 (D.) and 34 Vict. c. 9 (D.), the company being insolvent.

*Held*, that they were entitled to the relief asked, notwithstanding that proceedings to wind up the company were pending before the English courts, and that the above Acts were not *ultra vires* the Dominion Parliament.

*C. Moss, Q.C., and J. T. Small*, for petitioners.

*J. MacLennan, Q.C., and Francis*, for the company.

ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

Investment of trust funds.—*American Law Register*, April.

Actions by and against receivers.—*Ib.*

Proving criminal intent.—*Criminal Law Magazine*, March.

The defence of insanity in criminal cases.—*Ib.*, April, May.

The legal status of sleeping car companies.—

*American Law Review*, March, April.

Indian citizenship.—*Ib.*

Combinations to stifle or diminish competition from the standpoint of public policy.—*Ib.*

Exchange by-law in their relation to "option dealing."—*Ib.*

Life tenant and remainderman.—*Albany Law Journal*, May 29, June 5.

Forcible entry and detainer as a civil action.—*Central Law Journal*, March 26.

Patentability of mechanical processes.—*Ib.*

Handwriting as evidence of identity.—*Ib.*, April 2.

Power of municipal corporations.—*Ib.*

Liability of municipal corporations for negligence.—*Ib.*, April 9.

The right to inspect public records.—*Ib.*

Powers of bank directors.—*Ib.*, April 16.

What is an "action"?—*Law Journal* (London) March 13.

The privileges of an attaché.—*Ib.*

Appeal in interpleader.—*Ib.*, March 27, April 3.

Security from foreign counter-claimants.—*Ib.*, April 10.

Solicitors and special circumstances.—*Ib.*, April 24.

Stay of proceedings on nonpayment of costs.—*Ib.*, May 1.

Agreements for leases and forfeiture.—*Ib.*, May 15.

The report of the bar committee on land transfer.—*Ib.*

Rent, execution and bankruptcy.—*Ib.*, May 29.

The fiduciary position of directors.—*Irish Law Times*, March 13.

Exemptions from distress.—*Ib.*

Execution of testamentary power of appointment.—*Ib.*, March 27.

Taxation of bill of costs more than twelve months after delivery.—*Ib.*, April 10.

Perverse verdicts.—*Ib.*, April 24.

Must a felon be prosecuted before he is sued.—*Ib.*

Damages for dismissing servant.—*Ib.*, May 1.

Forfeiture of workman's wages.—*Ib.*

Change of risk between acceptance of proposal for life policy and tender of premium.—*Ib.*, May 8.

Transferred malice—striking at one and wounding another.—*Ib.*, May 29.

## FLOTSAM AND JETSAM.

## FLOTSAM AND JETSAM.

MR. JUSTICE PEARSON, of the Chancery Division of the High Court of Justice, died at a quarter past four o'clock in the afternoon of Thursday, the 13th May, at his residence in Onslow Square. In the second week of October, 1882, on the retirement of the late Vice-Chancellor Hall, Mr. John Pearson, Q.C., was appointed judge. He had been a leader successively in the Courts of Vice-Chancellor Malins and of Mr. Justice (now Lord Justice) Fry, and appeared in most cases of importance which passed before those tribunals, and had for years possessed a high reputation as a sound and painstaking lawyer. During twenty-two years of practice at the junior bar he had gained wide experience as an equity draftsman, and for fourteen years more he had sat in the front row of his Court. Many of his juniors, such as Mr. Justice Kay (who was called four years later than Mr. Justice Pearson), Mr. Justice Chitty, and Mr. Justice North (both called twelve years later) were already on the bench. Mr. Justice Kay's list of causes was bodily transferred "for trial or hearing only" to the new judge. Sir John Pearson, like several of our modern judges, was the son of a country clergyman, the Rev. John Norman Pearson, of Cambridge Wells. He was born in 1819, and at an early age went to Cambridge, where he entered at Trinity College, and was the contemporary of Lord Esher and Lord Justice Baggallay. Mr. Pearson was a scholar of his college, took prizes for classics as a freshman and junior soph., and for moral science also in his second year. He took his B.A. degree without honours on February 20th, 1841. On June 11th, 1844, he was called to the Bar by the Honourable Society of Lincoln's Inn, of which he afterwards became (in 1867) bencher, and, in 1874, treasurer. He married, on December 21st, 1854, Charlotte Augusta, daughter of the Rev. William Short, rector of St. George's, Bloomsbury. He took silk in December, 1866, and had his share of company cases. He had somewhat of a speciality for trade-mark and patent cases, and one of the last which he conducted before his elevation to

the bench was *The United Telephone Co. v. Harrison*. An account of his career on the bench is given elsewhere. On the Lords Justices taking their seats in Appeal Court II. on Friday, 14th May, Lord Justice Cotton said that they had suffered a severe loss by the death of Mr. Justice Pearson. He personally had known him well for many years; they were of about the same standing and when Queen's Counsel had long practised in the same Court; and his death was to him the loss of a dear friend. But he must speak of him as a judge. Since his appointment Mr. Justice Pearson had discharged his duties with great zeal, ability and expedition, and his judicial work was done in a way which was satisfactory to the suitors, and agreeable to the Bar practising in his Court and to the solicitors who had business there. His death would be deeply felt by all branches of the profession, as well as by the public, and also, as the loss of an able and esteemed judge, by all members of the Court of Appeal. Mr. Higgins, Q.C., said that no judge had ever shown greater or more unvarying courtesy and kindness to the members of the Bar when he was one of them or when he attained the bench. No one had ever heard anything from his lips which could give offence to the most delicate susceptibility. His great erudition and high qualifications were shown in his judgments, which the reports would hand down to posterity. It was impossible to adequately express the sorrow which his death would create in all ranks of the profession; and on behalf of the Bar, the learned counsel said he could cordially affirm everything which had fallen from Lord Justice Cotton. The religion he inherited and made his own was of a robust and practical type; his belief in the truths of revelation firm and intelligent; his nature was too large-hearted to permit of his being exclusive, and his mind was so judicial that he could not fail to be tolerant; not that he was indifferent to truth or error, but wherever he believed that an honest religious motive was at work he accepted and honoured it. So that, while a decided Churchman and a sincere and devout Christian, he never attached himself to any Church party. During some years of his life he took an active part in the Clerical and Lay Union which met in the vestry of St. George's, Bloomsbury, for discussing matters of social and religious interest, and was also occasionally a frequenter of the meetings of a kindred character still held in the vestry of St. James's, Piccadilly. He was a careful observer of the day of rest, and on more than one occasion came forward publicly to vindicate its sanctity. He presided, by request, in the first year of his judgeship at a meeting of

## FLOTSAM AND JETSAM.

the "Lawyers' Prayer Union," and gave a brief practical address. He was genial in society, and had a fondness for children (though he left none of his own), was at all times a kind and generous relative, an affectionate and constant friend.—*Law Journal*.

LORD FARNBOROUGH, better known as Sir Thomas Erskine May, died on the evening of Monday, the 17th May, at Westminster Palace. Ill-health was the immediate cause of his resignation of his office, and a chill caught on the preceding Tuesday at Folkestone produced a congestion which had a fatal result. Sir Thomas May was born in 1815, and was educated at Bedford School, under Dr. Brereton. He was no more than sixteen years old when Mr. Manners-Sutton, the Speaker of the House of Commons, nominated him to the office of assistant-librarian. In 1838 he was called to the Bar at the Middle Temple; he was appointed Examiner of Petitions for Private Bills in 1846, Taxing-master of the House of Commons in 1847, Clerk Assistant at the Table of the House in 1856, and Clerk of the House of Commons in 1871. He received for his services the Companionship of the Bath in 1860, and became a Knight Commander in 1866. In 1873 he was made a bencher of the Middle Temple, and was a member of the Commission for Statute Law Revision. On the 10th of this month he was created a peer by the title of Baron Farnborough of Farnborough in the county of Southampton, an honour which he has not lived to enjoy. He was a student from the very beginning of his career, and the history of his valuable but eventful life is a catalogue of his political studies and treatises. In 1844, when he was not thirty years old, he published his "Treatise on the Law, Privileges, Proceedings and Usage of Parliament," a concise and scientific digest of all that had been previously written on the subject. In 1861 he brought out the first part of his "Constitutional History of England since the Accession of George III.," a book which takes up the narrative where Hallam left it, and continues it in a more popular but not less impartial manner. Hallam found a not unworthy successor, whose good fortune it was to treat subjects of more present interest to this generation than the constitutional difficulties of the Tudor or the Stuart periods. The power of the Crown, the relations of Church and State, the position and rights of the House of Lords, freedom of speech, and the growing influence of the press in modern days, are subjects discussed learnedly and judicially by Sir Thomas May. His latest work, "Democracy in Europe," which was pro-

duced in 1877, although a careful summing-up of the main facts relating to the development of democracy, is of less value than books of which the weight and authority cannot be surpassed. He wrote in early life articles for Charles Knight and the "Penny Cyclopædia," and is credited with occasional contributions to the *Edinburgh Review*.—*Law Journal*.

MR. JAMES STIRLING, who has been appointed a judge of the High Court of Justice in the place of the late Sir John Pearson, is the eldest son of the Rev. James Stirling, of Aberdeen. He was born in 1836, and was educated at Trinity College, Cambridge, where he took his degree of M.A. in 1863, having been Senior Wrangler and First Smith's Prizeman. He was called to the Bar at Lincoln's Inn in Michaelmas Term, 1862, and in 1881 was appointed Junior Equity Counsel to the Treasury. He was from 1865 to 1876 a reporter at the Rolls, and has been a member of the Bar Committee since 1883.—*Law Journal*.

IN reading our recent London exchanges we have been struck by the outspoken severity and sarcasm of their remarks upon several of the English judges. Of course we have no opportunity to know whether these criticisms are well or ill founded, but it speaks well for the freedom of a country governed by a monarch that the subjects can with impunity attack judges appointed by the crown, and holding office for life. Our generally judicious London correspondent, in his letter in last week's issue, concluded with a sentence of such severity concerning the judicial manners of some of the English judges that we preferred to suppress it rather than run the risk of doing any of them a possible injustice.—*Albany Law Journal*.

INSANE JUDGES.—We have had occasion once or twice lately to chronicle charges of insanity against judges. We observe now still another case of the same character. A judge, it is said, becoming insane resigned his office. His resignation was accepted and his successor appointed. Upon recovering his senses he reclaimed his office, and the *ad interim* judge is said to have held the following colloquy with the governor:

Judge L.—"I suppose, that Judge C., now that he is restored to his office, will overrule all the decisions rendered by me while I held it."

## FLOTSAM AND JETSAM.

The Governor—"Certainly; he has become entirely restored to his reason."—*The Central Law Journal*.

A LAWYER in Western Tennessee asked one of his four ebony-hued clients, indicted jointly for hog-stealing:—"How many of you are accused?" "Fo', sah! but I tell you, lawyer, dey got dis ting all wrong. I ought to be one of de witnesses, but dey got me down as one of de men dat done de 'dultery'."

"My dear fellow," said an Indiana sheriff to his prisoner, "I must apologize to you for the sanitary condition of this jail. Several of the prisoners are down with the measles, but I assure you that it is not my fault." "Oh, no excuses," replied the prisoner, "it was my intention to break out as soon as possible, any way."

MAGISTRATE—"The serious charge of chicken-stealing is preferred against you, Uncle Rastus." Uncle Rastus—"Do de indictment say chicken-stealin'; yo' Honah?" Magistrate—"Yes." Uncle Rastus—"Den de indictment am defecktive, yo' Honah. It war a turkey I stole. I demands a *habious corpus*, and takes advantage ob de tecnum-calities of de law."

A JUDGE's first charge is thus reported by the *Medical and Surgical Reporter*:—"Gentlemen of the jury, charging a jury is a new business to me, as this is my first case. You have heard all the evidence, as well as myself; you have also heard what the learned counsel have said. If you believe what the counsel for the plaintiff has told you your verdict will be for the plaintiff; but if, on the other hand, you believe what the defendant's counsel have told you, then you will give a verdict for the defendant. But if you are like me, and don't believe what either of them has said, then I'll be hanged if I know what you will do. Constable, take charge of the jury."

SATIRICAL.—A lawyer cannot always trust his witnesses with impunity, any more than they can him. A coloured man once sued a neighbour for damages for the loss of his dog that the neighbour had killed. The defendant wished to prove that

the dog was a worthless cur, for whose destruction no damages ought to be recovered.

The attorney for the defence called one Sam Parker (coloured) to the witness stand, whereupon the following conversation ensued:

"Sam, did you know this dog that was killed by Mr. Jones?"

"Yessah, I war pussonally acquainted wid dat dog."

"Well, tell the jury what kind of a dog he was."

"He war a big yaller dog."

"What was he good for?"

"Well, he wouldn't hunt, an' he wouldn't do no gyard duty; he jes' lay round an' eat. Dat make 'em call 'im wat dey did."

"Yes. Well, what did they call him?"

"Well, sah, I don't want ter hurt yer feelin's, sah, an' I is mighty sorry you ax me dat, sah, but er fack is, dey call 'im 'Lawyer,' sah."—*The Central Law Journal*.

"THE herders on the ranch," writes a Texas traveller, "were all Mexicans, save an old Scotchman, who was a solitary instance to the contrary. He was a most markedly benevolent-looking old man, and had about him that copious halo of hair with which benevolence seems to delight to surround itself. He carried a crook, as seemed fitting, and had with him two sheep dogs, one of which the kindly man assured us he had frequently cured of a recurrent disease by cutting off pieces of its tail. This sacrificial part having been pretty well used up, the beast's situation in view of another attack was very ticklish: and it had in fact the air of occupying the anxious-seat."

This recurrent caudal-clipping was a desperate remedy even when applied to save the poor beast's *own* life—would it have been less desperate if the repeated sacrifice had been made to save the life of the *other* beast? If Gladstonian statesmanship continue to offer up clippings from the British lion's tail to cure the intermittent fever of the Irish beast, will not the life of that once noble animal speedily become very ticklish? Is it not indeed now occupying the anxious-seat?



## LAW SOCIETY OF UPPER CANADA.

## Law Society of Upper Canada.



## OSGOODE HALL.

HILARY TERM, 49 VICT., 1886.

During Hilary Term the following gentlemen were called to the Bar, namely: Messrs. Edward K. C. Martin and George L. Taylor, who passed their examination for Call last Term, and Messrs. Ernest Frederick Gunther, John Greer, Daniel Coughlin, Albert Edward Kennedy, Francis Robert Latchford, Frederick Weir Harcourt, Henry Wissler, Alfred Mitchell Lafferty, Thomas Davy Jermyn Farmer, John Wendell McCullough, Jos. Nason, Frederick Sheppard O'Connor, William Edward McKeough, Robert Bertram Beaumont, Charles Franklin Farewell.

The following gentlemen were granted Certificates of Fitness, namely: Messrs. J. A. McIntosh, W. D. McPherson, H. J. Wright, T. B. Lafferty, M. Wilkins, Jr., T. D. J. Farmer, O. E. Fleming, J. Nason, A. B. Shaw, W. Morris, A. S. Campbell, R. Walker, E. A. Wismer, E. M. Yarwood, W. E. McKeough, J. F. Williamson, H. Wessler, R. B. Beaumont, J. S. Mackay, D. Coughlin, J. Thacker, W. B. Raymond, J. W. McCullough, A. McKech-nie, G. E. Martin.

The following gentlemen were admitted as students-at-law, namely:

**Graduates.**—Victor Crossley McGirr, Archibald Weir, Isaac Newlands.

**Matriculants.**—Frederick William Hill, Arthur Franklin Crowe, Edward Lindsay Middleton, James Hamilton McCurry, Robert Ernest Gem-mell, Hugh James Minhinick, Merritt Oaklands Sheets, A. E. Slater.

**Juniors.**—George Edmund Jackson, John Agnew, George Turbill Falkner, Dighton Winans Baxter, Charles Edwin Oles, Charles James Notter, William Carnew, Henry Lumley Drayton, Charles Franklin Gilchriese, Edward John Harper, William Herbert Cawthra, John Francis Lennox, Augustus Grant Malcolm, Honore Chatelaine.

**Articled Clerk.**—Alfred James Fitzgerald Sullivan passed the Articled Clerks' Examination.

## SUBJECTS FOR EXAMINATIONS.

*Articled Clerks.*

- 1884 and 1885. { Arithmetic.  
Euclid, Bb. I., II., and III.  
English Grammar and Composition.  
English History—Queen Anne to George III.  
Modern Geography—North America and Europe.  
Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

*Students-at-Law.*

1884. { Cicero, Cato Major.  
Virgil, Æneid, B. V., vv. 1-361.  
Ovid, Fasti, B. I., vv. 1-300.  
Xenophon, Anabasis, B. II.  
Homer, Iliad, B. IV.
1885. { Xenophon, Anabasis, B. V.  
Homer, Iliad, B. IV.  
Cicero, Cato Major.  
Virgil, Æneid, B. I., vv. 1-304.  
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II, and III.

## ENGLISH.

A Paper on English Grammar.  
Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George II inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

## FRENCH.

A paper on Grammar,

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.  
1885—Emile de Bonnehose, Lazare Hoche.

## LAW SOCIETY OF UPPER CANADA.

## OF NATURAL PHILOSOPHY.

*Books*—Arnett's elements of Physics, and Somerville's Physical Geography.

*First Intermediate.*

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

*Second Intermediate.*

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

*For Certificate of Fitness.*

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

*For Call.*

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchor, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six

## LAW SOCIETY OF UPPER CANADA.

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchers, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## F E E S .

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

## PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890.

*Students-at-law.*

## CLASSICS.

1886.	{ Cicero, Cato Major.
	{ Virgil, Æneid, B. I., vv. 1-304.
	{ Cæsar, Bellum Britannicum.
	{ Xenophon, Anabasis, B. V.
1887.	{ Homer, Iliad, B. VI.
	{ Xenophon, Anabasis, B. I.
	{ Homer, Iliad, B. VI.
	{ Cicero, In Catilinam, I.
1888.	{ Virgil, Æneid, B. I.
	{ Cæsar, Bellum Britannicum.
	{ Xenophon, Anabasis, B. I.
	{ Homer, Iliad, B. IV.
1889.	{ Cæsar, B. G. I. (vv. 1-33.)
	{ Cicero, In Catilinam, I.
	{ Virgil, Æneid, B. I.
	{ Xenophon, Anabasis, B. II.
1890.	{ Homer, Iliad, B. VI.
	{ Cicero, In Catilinam, II.
	{ Virgil, Æneid, B. V.
	{ Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

## MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

## ENGLISH.

A Paper on English Grammar. Composition.

Critical reading of a Selected Poem:—

1886—Coleridge, Ancient Mariner and Christabel.

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

## HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

## FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886 } Souvestre, Un Philosophe sous le toits.

1887 } Lamartine, Christophe Colomb.

1889 }

## OR, NATURAL PHILOSOPHY.

Books—Arnot's Elements of Physics; or Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

## ARTICLED CLERKS.

Cicero, Cato Major; or, Virgil, Æneid, B. I., vv. 1-304, in the year 1886; and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, or Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe. Elements of Book-Keeping.

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.

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## DIARY FOR AUGUST.

- 1. Sun.....6th Sunday after Trinity. Slavery abolished in British West India Islands, 1838.
- 2. Fri.....Thomas Scott 4th C. J. of Q. B., 1806.
- 3. Sun.....7th Sunday after Trinity.
- 4. Sat.....8th Sunday after Trinity.
- 5. Tues.....Primary Exam. of students and articled clerks.
- 6. Thur.....Graduates seeking adm. to L. S. to present papers.
- 7. Fri.....Ashburton treaty concluded 1842.
- 8. Sat.....Last day for filing papers with Sec. Law Soc., before call or admission.
- 9. Sun.....9th Sunday after Trinity. Ont. Jud. Act came into force 1881.
- 10. Tues.....First intermediate examination.
- 11. Wed.....Last day for setting down for Div. Court Chan. Div.
- 12. Thur.....Second intermediate exam.
- 13. Sat.....10th Sunday after Trinity.
- 14. Tues.....Solicitors' examinations. Long Vac. in Sup. Ct. and Exch. Court ends.

TORONTO, AUGUST 1, 1886.

We are indebted to the courtesy of Mr. Wicksteed, Q.C., Law Clerk of the House of Commons, for an early copy of the Act of last session as to Real Property in the North-West Territories. It was brought forward in the Senate in 1885, by Sir Alex. Campbell, but not then passed. This year it was introduced by the Minister of Justice. It is an important measure for that new country. It makes more radical and drastic changes than were recently effected in Ontario in the same direction. It does not come into force until next year.

## RECENT ENGLISH DECISIONS.

### SPECIFIC PERFORMANCE—DEFENDANT PURCHASER IN DEFAULT—FORM OF ORDER.

In *Morgan v. Brisco*, 32 Chy. D. 192, Bacon, V. C., was asked to settle the form of order in an action for specific performance by a vendor, where the defendant made default in payment of the purchase money pursuant to the judgment. The plaintiff was given liberty to deposit the conveyance executed by him as an escrow, and

the title deeds, with an officer of the Court; and thereupon an order was made for payment to the plaintiff in four days after service of the order of the amount of the purchase money, interest, and costs.

### MORTGAGE ACTION—RECEIPTS BY RECEIVER AFTER REPORT.

In *Hoare v. Stephens*, 32 Chy. D. 194, Bacon, V. C., held that the receipt by a receiver of a sum of money after report, was no bar to a final order for foreclosure being granted, and he refused to follow *Jenner-Fust v. Needham* 31 Chy. D. 500, which we noted *ante*, p. 158, where Pearson, J., under the like circumstances, directed a new day to be appointed.

### TRUSTEE—INVESTMENT—TRADE PREMISES.

In *re Whitely*, *Whitely v. Learoyd*, 32 Chy. D. 196, Bacon, V. C., held that a trust to invest in "real securities" does not authorize an investment in freehold property—such as a brickyard—dependent for its value on a trade or business carried on upon the premises, in this respect refusing to follow a decision of Pearson, J., in *Re Pearson*, 51 L. T. N. S. 692. But an investment in freehold houses, which was made on a proper valuation by a competent person, was held to be proper, notwithstanding a subsequent depreciation in value of the property.

### MORTGAGEE IN POSSESSION—RECEIVER—[J. A. S. 17, ss. 8 (ONT.).]

In *Mason v. Westoby*, 32 Chy. D. 206, was a case in which a mortgagee in possession applied for a receiver, notwithstanding that he had been paid all his interest and costs out of rents received by him while in possession, and had a surplus of rents in his hands. Bacon, V. C., held that under the provision of the Judicature Act, which enacts that "a receiver may be appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just and convenient that such order should be made," the plaintiff was entitled to what he asked, and he directed the surplus in the plaintiff's hands to be paid to the receiver.

## RECENT ENGLISH DECISIONS.

## TRUSTEE ACT, 1850, s. 2—TRUSTEE EXTENSION ACT, 1852, s. 3.

*In re Findlay*, 32 Chy. D. 221, was an application under the Trustee Acts. A legacy belonging to an infant under a Scotch will, which made no express provision for maintenance, was paid over to a *curator bonis* appointed by a Scotch court, and was invested by him in New Zealand stock in the sole name of the infant. The Scotch court authorized the *curator* to advance from time to time sums out of the capital not exceeding in all £100, to supplement the income of the infant, and to enable her to be placed at a suitable school. The stock was transferable at the Bank of England, and the *curator* presented a petition asking that the right to transfer £100 of the stock might be vested in him with liberty to sell and transfer the same; and that the accrued and future accruing dividends of the rest of the stock might be paid to him, he undertaking to apply them towards the maintenance of the infant, and also that he might be appointed guardian. North, J., made the order, holding that the infant was a "trustee" of the stock within the meaning of the Trustee Acts.

## TRUSTEE ACT, 1850, ss. 33, 34—APPOINTMENT OF NEW TRUSTEE.

*Davis v. Hodgson*, 32 Chy. D. 225, is another case under the Trustee Act, 1850, in which the court (North, J.) appointed three existing trustees, new trustees in place of themselves and another trustee who was bankrupt and had absconded, there being difficulty, owing to the litigation, in procuring a fourth person to accept the office; but the new trustees were required to undertake to pay and transfer the trust estate when received into court.

## ACCUMULATION—MAINTENANCE.

*In re Collins*, *Collins v. Collins*, 32 Chy. D. 229, a testator having directed the income of all his residuary, real and personal estate to be accumulated for twenty-one years, and having given the accumulated estates to his sister for life, then to her three sons successively in tail male, on an application by the three sons by their next friend for an allowance of £2,000 a year for their maintenance and education out of the income directed to be accumulated, Pearson, J., following *Havelock v. Havelock*, 17 Chy. D. 807, made the order asked.

## INCHOATE MARRIAGE SETTLEMENT—CANCELLATION.

*Bond v. Walford*, 32 Chy. D. 238, was a suit to cancel a marriage settlement made in contemplation of a marriage which was never solemnized. The engrossment had been executed by the intended wife and her father, and provided *inter alia* for the settlement of certain funds to be provided by the father, and also the present and after-acquired property of the lady, and was delivered to the solicitor of the intended husband, but had never been executed by him nor the trustee. The engagement was broken off by mutual consent, and after the lapse of three years and a half, the court (Pearson, J.) declared the engrossment void as a settlement, and ordered it to be given up.

## ADMINISTRATION—COSTS—BANKRUPT EXECUTOR DEBTOR TO ESTATE.

*In re Vowles*, *O'Donaghue v. Vowles*, 32 Chy. D. 243, was an administration action, the sole executor, who was a defendant, became bankrupt after the administration judgment. He was a debtor to the estate in respect of a loan made to him by the testator. Upon the question of costs, Pearson, J., held that he was entitled to his costs, subsequent to the bankruptcy, out of the estate, but that his prior costs must be set off against the debt due him, following *Re Basham*, 23 Chy. D. 195.

## SOLICITOR—AGENT—RETAINER.

The point of practice determined in *re Scholes*, 32 Chy. D. 245, was that an order for taxation of costs obtained by London agents acting for a country principal was irregular, because the names of the London agents were indorsed on the petition as principals, and the order was therefore discharged on motion of the client on whose behalf it was issued, but without costs.

## RECURRING DAMAGE—CAUSE OF ACTION—LIMITATION.

Taking up now the Appeal Cases, the first that demands attention is the important case of *The Darby Main Colliery Co. v. Mitchell*, 11 App. Cas., 127. This is a decision of the House of Lords on the question whether after a plaintiff has once recovered damages for an injury to his property caused by an act of the

## RECENT ENGLISH DECISIONS.

defendant, not wrongful *per se*, he can, on a further damage subsequently arising from the same cause, bring an action to recover therefor, after the lapse of more than six years from the original act. The Lords determined this question in the affirmative; Lord Blackburn, however, dissented. The damage in question was occasioned by the subsidence of the plaintiff's land, owing to the defendants' mining operations. These operations ceased in 1868, when a subsidence took place, and a further subsidence took place in 1871, by which the plaintiff suffered damage, and for which the defendants made compensation. Within six years before the present action a further subsidence took place, and the question was whether any action would lie for it. Lord Blackburn was of opinion that the cause of action arose when the removal of the support was followed by the first subsidence, and therefore, the plaintiffs could not recover; but the majority of the Lords adhered to the opinion that each subsidence constituted a fresh cause of action, although having its origin in the same act of the defendant.

The views of Lord Blackburn and the other learned law lords may be gathered from the following extracts from the judgments of Lord Blackburn and Lord Fitzgerald. Lord Blackburn, at p. 141, says:

I think that *Bonomi v. Backhouse*, 9 H. L. C. 303, does decide that there is no cause of action until there is actual damage sustained, and does decide that the Court of Exchequer erred when in *Vicklin v. Williams*, 10 Ex. 259, they said that there was an injury to the right as soon as support was rendered insufficient, though no damage had occurred. But I do not think that it at all follows from this, that the act of removing the minerals to such an extent as to make the support insufficient is an innocent act rendered wrongful by the subsequent damage. That would be a great anomaly, for I think there is no other instance in our law where an action lies in consequence of damage against a person doing an innocent act. There are many where no action lies against the doer of an improper act, unless or until damage accrues.

On the other hand Lord Fitzgerald, at p. 151, says:

It seems to me that *Bonomi v. Backhouse* did decide that the removal of the subjacent strata was an act (I will not say an innocent act) done in the

legitimate exercise of ordinary ownership, which, *per se*, gave no right of action to the owner of the surface, and that the latter had no right of action until his enjoyment of the surface was actually disturbed. The disturbance then constituted his right of action.

There was a complete cause of action in 1868, in respect of which compensation was given; but there was a liability to further disturbance. The defendants permitted the state of things to continue without taking any steps to prevent the occurrence of any future injury. A fresh subsidence took place, causing a new and further disturbance of the plaintiff's engagement, which gave him a new and distinct cause of action.

## NEW TRIAL—VERDICT AGAINST EVIDENCE.

*The Metropolitan Ry. Co. v. Wright*, 11 App. Cas. 152, was an appeal from a refusal of the Court of Appeal to grant a new trial on the ground that the verdict of the jury was against the weight of evidence. The House of Lords affirmed the courts below, holding that a new trial ought not to be granted on the ground of the verdict being against the weight of evidence, unless the verdict be one which a jury, viewing the whole of the evidence reasonably, could not properly find.

## NEWSPAPER—LIBEL—PRIVILEGE—PUBLIC OFFICER.

*Davis v. Shephstone*, 11 App. Cas. 187, was an appeal to the Privy Council from the Supreme Court of Natal refusing a new trial. The action was one for libel, published in the defendants' newspaper. The libel in question consisted of certain statements of alleged particular acts of misconduct of the plaintiff in his official capacity as a public officer, for the truth of which the defendants vouched, and on the assumption of their truth, they commented on the defendant in highly offensive and injurious language.

On the trial, it was proved that the charges were without foundation, but that they had been made to the defendants, and published by them believing them to be true. But it was held by the Privy Council, affirming the court below, that the privilege, which protects fair and accurate reports of proceedings in Parliament and Courts of Justice, does not extend to fair and accurate reports of statements made to editors of newspapers. The appeal was therefore dismissed.

## RECENT ENGLISH DECISIONS—LAW SOCIETY.

LEGISLATIVE ASSEMBLY—SUSPENSION OF MEMBER—  
TRESPASS.

*Barton v. Taylor*, 11 App. Cas. 197, was an action brought by a member of the House of Assembly of N. S. Wales, against the Speaker of the House, for trespass in causing the plaintiff to be removed from and prevented from entering the House after a resolution had been passed, that he, the defendant, "be suspended from the service of the House." The defendant pleaded justification, setting up the resolution, and the orders of the House, whereby the rules, forms and usages in force in the British House of Commons were adopted. The plaintiff demurred, and the case came before the Privy Council on appeal from the judgment allowing the demurrer, and their Lordships held, that the resolution must not be construed as operating beyond the sitting during which it was passed, and further, that the order of the House of Assembly adopting the rules of the British House of Commons, though valid as far as it went, must be construed as relating only to such rules, forms and usages as were in existence at the date of the order, and would not have the effect, unless expressly so worded, of introducing rules, orders or usages, subsequently adopted in the British House of Commons. Their lordships further laid down that the powers inherent of necessity in a Colonial Legislative Assembly are only such as are necessary to the existence of such a body and the proper exercise of the functions which it is to execute, and do not authorize it to exercise punitive measures or unconditional suspension of a member during the pleasure of the Assembly. But the power of the Assembly to pass a standing order giving itself power to punish an obstructing member, or remove him from the Chamber for any longer period than the sitting during which the obstruction took place, was conceded, and the judgment of the court below was affirmed on the ground that this was not done, not that it could not have been done.

## LEAVE TO APPEAL.

The only remaining case to be noted is the *Attorney General of Nova Scotia v. Gregory*, 11 App. Cas. 229. In this case, by special agreement sanctioned by the court, the petitioner had come in and consented to be made a party to the cause in appeal, and to be bound by the

order of the Supreme Court to be made therein, but by the terms of the agreement, the powers of the Supreme Court were defined and restricted, and its order was "to be construed a final disposition of all contentions whether now in litigation or not." The petitioner applied for leave to appeal from the decision of the Supreme Court, but it was held by the Privy Council, that the Supreme Court was acting under the terms of a special reference and not in its ordinary jurisdiction as a Court of Appeal, and leave to appeal was therefore refused.

## LAW SOCIETY.

RESUME OF PROCEEDINGS OF  
CONVOCATION.

HILARY TERM, 1886.

FRIDAY, FEBRUARY 12TH.

Convocation met.

Present—The Treasurer and Messrs. Britton, Crickmore, Falconbridge, Ferguson, Foy, Hoskin, Irving, Kerr, MacKelcan, MacLennan, Morris, Moss, Murray, McCarthy, Purdom, Smith.

Mr. Moss, from the Committee on Legal Education, reported on the petition of John Geale.

Ordered for immediate consideration and adopted.

Mr. Moss, from the same Committee, reported on the petition of Mr. G. E. Martin, recommending that he be allowed on the 16th, to prove completion of service, and that he do then receive his certificate.

Ordered for immediate consideration. Adopted and ordered accordingly.

Mr. Moss, from the same Committee, reported on the case of Mr. Bangwier.

Ordered for immediate consideration. Adopted and ordered, that Mr. Bangwier be allowed his Second Intermediate Examination.

Ordered, That Mr. Raymond receive his Certificate of Fitness.

## LAW SOCIETY.

Mr. Maclellan, from the Reporting Committee, presented their report as follows :

1. The work of reporting in all the Courts is now in a reasonably satisfactory state, and the arrangements which were made by Mr. Grant are bringing up the arrears in the Court of Appeal.

A detailed statement prepared by the Editor is submitted herewith.

2. Your Committee have considered the letter of Mr. Taylor, of Winnipeg, referred to them, and recommend that all Solicitors and Barristers of Manitoba be allowed to receive the reports for the sum of seventeen dollars per annum, and fifty cents to cover the expense of mailing, payable at the same time, and with the same penalty for delay in payment, as the fees for Solicitors' certificates.

3. Your Committee also recommend, that all members of the Ontario Bar, not being Solicitors, be entitled to receive the reports for the sum of fifteen dollars per annum, in addition to the Barrister's fee, and payable as above, and that payment for them may be received for the present year up to the first day of May in both cases.

The report was adopted.

Mr. Moss, from the Committee on Legal Education, reported on the case of Mr. H. H. Robertson and others, referred to them as follows :

The Committee on Legal Education beg to report, that in the cases of Mr. H. H. Robertson, and other unsuccessful candidates for call at the last examination they have examined the answers of these gentlemen and conferred with the examiners, and on the whole they see no ground for interference with the examiners' report.

The Committee are of opinion that, unless under the most exceptional circumstances, there should not be revision by Convocation of the results arrived at by the examiners in any particular case. Cases, such as accidental omissions, to include marks allowed or intended to be allowed in a final summing up of marks or any other case of clear mistake or the like, might be suggested as justifying the interposition of Convocation to correct, but such cases are obviously different from interfering to correct errors or supposed errors in judgment.

The report was adopted.

Mr. Moss, from the Committee on Legal Education, with reference to the resolutions adopted on the motion of Mr. Purdom as to Legal Education, reported that gentlemen had attended the meeting, and suggested that it would be impossible to deal with the subject in time for the meeting of Convocation to-day, of which opinion were the Committee, and the consideration of the resolution was accordingly adjourned.

Mr. Murray, from the Finance Committee, reported in pursuance of the resolution of the first day of this term, sub-

mitting a statement of the assets and liabilities of the Society, as of the 31st day of December last.

Ordered, That the Finance Committee be requested to ascertain the cost of a valuation of the Library, and if they think it advisable to procure such a valuation.

Mr. Kerr, from the Committee on the Journals, reported, submitting their draft of the consolidation of the rules.

Ordered, That the Committee be authorized to have the draft printed for the consideration of Convocation before next term, and distributed to the members of Convocation, the type to be kept standing.

The letter of L. A. Carscallen, of Nanawane, was read; ordered that it be referred to the Committee on Discipline to ascertain and report whether there is a *prima facie* case for enquiry.

The letter of A. Grant, Esq., Reporter of Court of Appeal, dated 6th February, was read.

Ordered, That the letter be taken into consideration on the first day of next term.

Mr. Maclellan reported that he had complied with the request of Convocation in the matter of Mr. D. R. Davis' petition to the Ontario Legislature.

Ordered, That a Committee composed of the Treasurer and Messrs. McCarthy, Moss and Kerr, be appointed to represent to members of the Legislature, the views of Convocation as to special legislation, on the subjects of call and admission, with power to present a petition on behalf of Convocation to the assembly, and to appear before the Private Bill Committee on the Bill of Mr. Davis, if they think it expedient.

# ABSTRACT OF INCOME AND EXPENDITURE FOR 1885.

## RECEIPTS.

Certificate and Term Fees, Costs, Fines and Arrears	
\$689 .....	\$19,318 84
Less Fees returned .....	76 00
	<u>\$19,242 84</u>
Notice Fees .....	\$692 00
Less Fees returned .....	4 00
	<u>\$688 00</u>
Attorneys' Examination Fees.	\$7,761 00
Less Fees returned .....	1,000 00
	<u>\$6,761 00</u>
Students' Admission Fees....	\$7,240 00
Less Fees returned .....	658 00
	<u>\$6,582 00</u>



## LAW SOCIETY.

Call Fees.....	\$13,521 00
Less Fees returned .....	\$3,519 00
	<u>\$10,002 00</u>
Interest and Dividends.....	\$2,864 93

*Sundries.*

Fees on Petitions, Diplomas and Certificates of Admis- sion .....	\$169 00
Wardrobe Keys sold .....	36 80
	<u>\$46,346 57</u>

## EXPENDITURE.

*Reporting.*

Salaries.....	\$8,600 00
Printing .....	9,966 63
Notes for <i>Law Journal</i> and <i>Law Times</i> .....	339 50
	<u>\$18,906 13</u>
Less Reports sold.....	3,019 60
	<u>\$15,886 53</u>

*Examinations.*

Salaries.....	\$3,200 00
Scholarships .....	1,480 00
Printing and stationery .....	275 15
Prizes in books (Law School)	25 00
Engrossing Diplomas and Cer- tificates .....	
Examiners for Matriculation.	<u>240 00</u>
	<u>\$5,220 15</u>
Library—	
Books, Binding and Repairs.	<u>\$2,836 59</u>

*General Expenses.*

Salaries—	
Secretary, Sub-Treasurer and Librarian .....	\$2,000 00
Assistants .....	1,254 15
Housekeeper .....	360 00
	<u>\$3,614 15</u>

*Lighting, Heating, Water and Insurance.*

Gas.....	\$232 88
Water .....	95 64
Insurance .....	685 00
Fire Grenades.....	10 00
Fuel.....	433 26
Repairs to Apparatus .....	482 89
	<u>\$1,939 67</u>

*Grounds.*

Gardener and Assistant .....	\$624 26
Tools .....	1 00
Seeds and Fertilizer .....	16 15
Snow Clearing.....	43 80
	<u>\$685 21</u>

*Sundries.*

Postages .....	\$53 51
Advertising, including <i>Law</i> <i>Journal</i> , account.....	102 75
Law Costs .....	547 21
Furniture .....	1,175 55
Repairs.....	496 26

G. T. Berthon, and S. E. Roberts, Portraits .....	308 75
Grant D. B. Read, Q.C., ....	2,000 00
Term Lunches .....	611 42
County Libraries Aid .....	2,489 60
Telephone Office.....	345 76
Auditor, \$100, Aikenhead & Co., \$21.40 .....	121 40
Dawson Telephone Office, \$20, Engrossing, \$15.....	35 00
Resumé, \$36, Hardy, \$6.25, Finch, \$23.75.....	66 00
Watchman .....	107 50
Washing towels etc., \$9 04, Dusting Books, \$18.13.....	27 17
Ellis, \$5, Guarantee, Co. \$20, Ice, \$21.....	46 00
Oiling Floors, etc., \$30.75, J. A. Fleming, travelling ex. \$11....	41 75
Petty charges.....	59 80
Stationery, Printing, etc.....	262 91
	<u>\$8,898 34</u>
Balance.....	<u>7,265 93</u>
	<u>\$46,346 57</u>

Audited and found correct, Toronto, 28th Jan.  
1886. (Sgd.) HENRY WM. EDDIS, Auditor.

## EASTER TERM, 1886.

MONDAY, MAY 17TH.

Convocation met.

Present—Messrs. Edward Blake, S. H. Blake, Britton, Falconbridge, Ferguson, Foy, Irving, Kerr, Mackelcan, MacLennan, Morris, Moss, Murray, McMichael, Osler, Pardee, Robertson, Smith.

On motion of Mr. Robertson, seconded by Mr. Irving, it is ordered that Edward Blake, Q.C., do take the chair.

The Secretary read the report of the scrutineers, and declared the following persons to be elected Benchers of the Law Society for the ensuing five years, namely:—W. R. Meredith, Charles Moss, D. McCarthy, C. Robinson, B. M. Britton, W. G. Falconbridge, A. Hudspeth, B. B. Osler, D. Guthrie, F. Mackelcan, James MacLennan, E. Martin, T. B. Pardee, John Bell, Æ. Irving, C. F. Fraser, A. S. Hardy, John Hoskin, J. J. Foy, J. K. Kerr, Z. A. Lash, Dr. McMichael, J. H. Ferguson, Thomas Robertson, J. H. Morris, Dr. L. W. Smith, James Beaty, H. Cameron, H. W. M. Murray, T. H. Purdom.

Mr. Robertson moved, and Mr. Irving seconded, That Edward Blake be elected

## LAW SOCIETY.

Treasurer for the ensuing year. Carried unanimously.

The Treasurer took the chair.

Ordered, That the Treasurer, and Messrs. MacLennan, Murray, Irving, Moss, Kerr, Robertson, and Mackelcan, be appointed a Committee to strike the Standing Committees to be selected by Convocation in accordance with Rule 100.

During this Term the following gentlemen were called to the Bar, namely:—Messrs. George Goldwin Smith Lindsey, Arthur Eugene O'Meara, Edward Albert Holman, Alson Alexander Fisher, Edmund James Bristol, Henry James Wright, Alexander McLean, Robert George Code, Robert Alexander Dickson, Donald MacFarlane Fraser, Peter Doy Cunningham, Robert Franklin Sutherland, John Mortimer Duggan, John Graham Forgie, Thomas Hobson, Thomas Evan Griffith, William Morris, Herbert Macdonald Mowat, Joseph Mackenzie Rogers, Hugh Thomas Kelly, William James Church, Harry Hyndman Robertson, George Herbert Stephenson, Richard Armstrong, John Thacker, George Edgar Martin, William Davis Swayzie.

The following gentlemen received Certificates of Fitness, namely:—Mr. T. E. Griffiths, who passed in Michaelmas Term, 1885; and Messrs. R. Armstrong, E. J. Bristol, A. E. Kennedy, E. A. Holman, A. A. Fisher, G. Wall, D. A. Givens, W. T. McMullen, N. A. Bartlett, Thomas Hobson, F. C. Powell, H. F. Jell, J. C. Mewburn, W. G. Fisher, A. W. Ford, D. C. Hossack, W. G. McDonald, W. R. Smyth, G. H. Stephenson.

The following gentlemen passed the First Intermediate Examination, namely:—Messrs. Lake, Holmes, Williams, Hunter, Burns, Dumble, McNeill (J. H.), Walker, Osborne, Walmsley, Kelly, Kemp, Baird, Macdonald, McNeill (E. P.), Featherstonehaugh (as a Student-at-Law only), Gould, Hastings, Scott, Scatcherd, Church, Wigle, Coe, Bridgman, Bannerman, Simpson, Box, Mealey, Wallbridge, Carey, Cartwright, Edgar, Graham, Lyon, Thompson, Vickers.

The following gentlemen passed the Second Intermediate Examination, namely:—Messrs. Holmes (G. W.), Johnston, Scott, Page, McGovern, Weekes, Holmes (W. H. F.), Torrance, Fletcher, Langton, McCrimmon, Fitch, Mussen, Dods, Mont-

gomery, Bruce, Code, Gibson, Doyle, Henderson, Lahey, Dixon, Greene.

The following gentlemen were admitted into the Society as Students-at-Law, namely:

*Graduates.*—John Howard Hunter, M.A., Archibald Bain McCollum, M.A., Arthur James Forward, B.A., William Henry Irving, B.A., George E. Kynaston Cross, B.A.

*Matriculants of Universities.*—William James Fleury.

*Junior Class.*—William Hardy Murray, D'Arcy Fenton, Norman MacKenzie, William John Glover, William Senkler Buell, Arthur Hervey Selwyn Marks, David Mackenzie, Thomas Joseph Murphy, Newton Wesley Rowell, James William McColl, Alexander Grant McLean, Herbert Lavallin Puxley, Percy Allan Malcolmson, Robert Burnham Revell, Robert Moore Noble, Robert Alexander Montgomery, James Albert McMullen, William Alexander Sutherland.

Mr. Irving, from the Select Committee appointed to strike Standing Committees, presented their report, which was adopted.

Ordered, That the following gentlemen do compose the several Standing Committees for 1886, namely:

*Finance.*—Messrs. S. H. Blake, J. J. Foy, Æ. Irving, E. Martin, Z. A. Lash, L. W. Smith, H. W. M. Murray, T. H. Purdom, W. G. Falconbridge.

*Reporting.*—Messrs. B. M. Britton, Hector Cameron, F. Mackelcan, E. Martin, D. McCarthy, H. W. M. Murray, B. B. Osler, James MacLennan, W. G. Falconbridge.

*Discipline.*—Messrs. C. Robinson, A. Hudspeth, J. K. Kerr, F. Mackelcan, James MacLennan, D. McMichael, Thos. Robertson, L. W. Smith, John Hoskin.

*Library.*—Messrs. James Beaty, C. Robinson, S. H. Blake, Hector Cameron, J. H. Ferguson, Dr. McMichael, J. H. Morris, Charles Moss, Æ. Irving.

*Legal Education.*—Messrs. Z. A. Lash, J. H. Ferguson, B. B. Osler, John Hoskin, F. Mackelcan, W. R. Meredith, J. H. Morris, Charles Moss, C. Robinson.

*Journals and Printing.*—Messrs. B. M. Britton, J. J. Foy, C. F. Fraser, John Hoskin, John Bell, D. McCarthy, Charles Moss, J. K. Kerr, T. B. Pardee.

*County Libraries Aid.*—Messrs. B. M. Britton, Hector Cameron, D. Guthrie, A.

## LAW SOCIETY.

Hudspeth, A. S. Hardy, J. K. Kerr, W. R. Meredith, Thomas Robertson, E. Martin.

The Select Committee, appointed last term in reference to special legislation as to call and admission, presented their report, which was adopted.

Mr. Murray presented the report of the Finance Committee with reference to the maturing of certain debentures held by the Society, and as to the condition of the lattice walks in front of Osgoode Hall.

Ordered, That the Finance Committee do arrange for the re-investment of the maturing debentures on the best terms.

The report of the Select Committee on honors and scholarships in connection with the Intermediate Examinations was read and received.

Ordered, That Messrs. W. F. Johnston, G. H. Holmes and W. L. Scott, be declared to have passed their Second Intermediate Examination with honors.

Ordered, That Mr. Johnston do receive a scholarship of one hundred dollars, Mr. Holmes a scholarship of sixty dollars, and Mr. Scott a scholarship of forty dollars.

The petition of Mr. Michael Sullivan was received and read. Ordered to be referred to the Finance Committee with power to act.

Mr. Moss, from the Committee on Legal Education in the case of W. R. Smythe referred to them, reported recommending that his term of service should be allowed.

Ordered, That Mr. Smythe receive his Certificate of Fitness.

The letter of C. P. Simpson was received and read.

Ordered, That the letter be referred to the Finance Committee for inquiry and report.

The letter of Mr. Pousette was read, and referred to the Finance Committee with power to act.

The letter of Andrew Clarke as to a solicitor was read.

Ordered, That it be referred to the Discipline Committee to enquire as to whether there is a *prima facie* case for action.

Mr. Grant's letter was brought up for consideration.

Ordered, That it be considered on May 18th.

Mr. Britton gave notice that on the last day of the sitting of Convocation in this

term he would move a Rule to the effect that the Supreme Court reports be furnished as formerly, and that all orders or rules to the contrary be reconsidered.

Ordered, That the scrutineers appointed to act and count the votes at the late election of Benchers having found it advisable to ask Mr. Maclellan (who was appointed to act as and for the Treasurer) to act along with them in order to save time, and Mr. Maclellan having acted, that he be paid the same fee as the said scrutineers.

TUESDAY, MAY 18TH.

Convocation met.

Present—The Treasurer, and Messrs. S. H. Blake, Falconbridge, Foy, Hardy, Hudspeth, Irving, Maclellan, Martin, Meredith, Morris, Murray.

The letter of Mr. Grant, reporter of the Court of Appeal, of Feb. 6th, 1886, was read and considered, and it was resolved that Mr. Grant be informed that his proposal cannot be accepted.

The petition of A. J. F. Sullivan was received, read and referred to the Legal Education Committee for enquiry and report.

The report of the Lecturers on the Law School was received and read.

The Secretary reported on the case of T. E. Griffiths, reserved from Michaelmas Term, that he had completed his papers and was entitled to receive his Certificate of Fitness.

Ordered, That Mr. Griffith receive his Certificate of Fitness.

SATURDAY, 22ND MAY.

Convocation met.

Present—Messrs. Cameron, Falconbridge, Irving, Kerr, Lash, Maclellan, McMichael, Meredith, Morris, Moss, Murray, Robinson, Smith.

In the absence of the Treasurer, Mr. Irving was elected Chairman.

Mr. Maclellan presented the report of the Reporting Committee, accompanied by the Editor-in-Chief's report upon the state of the work, which was adopted.

The Chairman of the Library Committee presented the report of the Committee with reference to the salary of the Junior Assistant in the Library. The report was adopted.

## LAW SOCIETY.

Mr. Murray gave notice of a rule founded on the report to amend Rule 119, sub-section 2, by taking out the word "five," and inserting the word "six" in lieu thereof.

Mr. Murray, from the Finance Committee, presented the report of the Committee on the subject of Mr. C. P. Simpson's letter, *re* his fees and fines.

The report was ordered to be taken into consideration on Friday next, 28th inst.

The Secretary laid before Convocation the petition of L. U. C. Titus to the High Court of Justice, Chancery Division, praying for his reinstatement, and that his name be restored to the list of solicitors, he having been struck off the roll of that division.

Ordered, That the solicitor of the Society be instructed to appear upon the motion.

Mr. Moss, from the Legal Education Committee, reported on the case of Mr. Arthur G. Browning, which was adopted, and it was ordered, That Mr. Arthur G. Browning be admitted as a Student-at-Law in the Graduate Class.

Mr. Grant's letter to the Secretary of May 20th was read.

Mr. Murray, pursuant to notice, moved to amend the Rule relating to the number of persons to be present at the Examinations in the Law School for the awarding of prizes, by striking out the "eight or more students have competed thereat."

Ordered, That leave be granted to introduce the Rule, and that the said Rule be read a first time.

Mr. Murray moved, pursuant to notice, that the Rule 128 be amended by striking out the words "last Friday."

Ordered, That the Rule be read a first time.

FRIDAY, 28TH MAY 1886.

Convocation met.

Present—Messrs. Falconbridge, Foy, Fraser, Guthrie, Hardy, Irving, Kerr, Lash, Mackelcan, MacLennan, Morris, Moss, Murray, Osler.

In the absence of the Treasurer, Mr. Irving was elected Chairman.

The petition of Mr. Ronald David Gunn was read and received praying for a re-examination of his answers, and stating that through omission or oversight in

the examination of his papers by the examiners, he had not obtained his Certificate of Fitness.

Convocation having inspected the examination papers, directed the Secretary to inform Mr. Gunn that there had been no omission or oversight in the examination of his papers.

Ordered, That the consideration of Mr. C. P. Simpson's letter, *re* his fines, be postponed until Saturday, the last day of Term.

The Rule continuing the Law School was read a first time.

Ordered, That the Rule be read a second time on Saturday, June 5th.

Ordered, That a call of the Bench be made for the consideration of the same, and that meanwhile, the report of the Lecturers be printed and distributed.

Mr. Murray moved the second reading of the following rule.

Rule number 6, for the encouragement of Legal Studies, is hereby amended by striking out the words, "and that eight or more students have competed thereat."

Ordered, That the second reading be deferred until Saturday, 5th June, and that notice be given as in the case of the Rule continuing the Law School.

On motion of Mr. Murray.

Rule 119, Sec. 2, was amended so as to read as follows:

"The salary of one of the General Assistants shall be \$800 per annum, and of the other General Assistant \$600 per annum, payable monthly."

On motion of Mr. Murray, the Rule amending Rule number 128, was read a second and third time.

Mr. Osler moved that the application of the County of York Law Association be referred to the County Libraries Committees, who are asked to report to Convocation at its next meeting, in order that it may be considered.

Ordered, That the application of the County of York Law Association be referred to the County Libraries Aid Committee, who are asked to report to Convocation at its next meeting, in order that it may then be considered.

SATURDAY, 5TH JUNE, 1886.

Convocation met.

Present—The Treasurer and Messrs. S. H. Blake, Britton, Falconbridge, Foy,

Hardy, Irving, Kerr, Lash, Meredith, Morris, Moss, Murray, Osler, Robertson, Robinson, Smith.

Mr. Moss, from the Legal Education Committee, reported in the case of Eudo Saunders, recommending that he be admitted to the books of the Society as a Student-at-Law, as of Trinity Term 1880.

Ordered for immediate consideration and adopted.

Mr. Martin, from the County Libraries Aid Committee, presented the report of the Committee, which was ordered for immediate consideration. The report was adopted.

Ordered, That the sum of \$1,500 be paid to the County of York Law Association as an Initiatory grant, and that the annual grant be at the rate of two dollars a year for each member paying two dollars, and one dollar a year for each member paying one dollar.

The petition of John King, Barrister-at-Law, as to a Solicitor, was read, and ordered for immediate consideration.

Ordered, That the petition be referred to the Discipline Committee to report whether a *prima facie* case is made by the petitioner.

The letter of Mr. Kingsford as to the remuneration of the examiners on the Primary Examination, was received and read.

Ordered, That it be referred to the Committee on Legal Education, and to the Finance Committee so far as the question of remuneration is concerned, to report to Convocation.

The second reading of the Rule as to the Law School, was ordered to be postponed till the 29th June, notice to be given by the Secretary.

The second reading of the Rule as to examinations under the Rule for the encouragement of legal studies to be postponed to the same date, notice to be given by the Secretary.

Mr. Britton, pursuant to notice, moved the introduction of a Rule providing for the supply of the Supreme Court reports to the profession.

Leave was given to introduce the Rule. The Rule was read a first time.

Ordered for a second reading at next sitting of Convocation, notice to be given by the Secretary.

Mr. Martin gave notice that he would move on 29th June next to amend Rule 142, Section E, and to further amend the Rule by permitting the increase of grants to County Libraries in outer counties, and to permit advances to be made in special cases, repayable out of future annual grants.

Convocation adjourned.

(Sgd.) EDWARD BLAKE,  
Treasurer.

## NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

### QUEEN'S BENCH DIVISION.

#### MATTHEWS V. HAMILTON POWDER COMPANY.

*Explosion in a powder mill—Neglect of superintendent to repair, the neglect of a fellow-workman—Liability of Company through express direction of director to repair.*

The plaintiff sued as administratrix of George Matthews, who was killed on the 9th of October, 1884, by an explosion of the defendants' mills for the manufacture of powder, at the Village of Cumminsville, in the County of Halton. The head offices of the defendant company were located in Montreal. The works at Cumminsville were carried on by means of a superintendent, whose duty it was to hire, discharge and pay the workmen, keep the machinery, works and buildings in repair, and generally to manage and control the business, subject, however, to such instructions as he might receive from the head office, and subject to the further superintendence of one Watson, one of the directors, who lived in Hamilton, and who occasionally visited the works.

Q. B. Div.]

NOTES OF CANADIAN CASES.

[Q. B. Div.]

Some time prior to the said explosion, and while the works were idle during the summer months, Watson visited the works. At that time the shaker, a machine used in the manufacture of powder in one of the several buildings composing the works, called the crackers, was out of repair. Watson gave instructions to Corlett, the superintendent, and to Dent, a carpenter employed on the premises, to have this machine repaired prior to commencing operations. The machine was not repaired, through the neglect of the superintendent or through the company having sent orders to be filled before the repairs could be made.

*Held*, that though the superintendent's neglect was the neglect of a fellow-workman, yet Watson, a director, having given express instructions to have the repairs made, Corlett's neglect to repair the shaker was the neglect of the company, and the defendants were liable.

*Robinson, Q. C., and E. Martin, Q. C., for motion.*

*Furlerton, contra.*

and immediately notified the defendants of the forgery and demanded payment of the amount of the demand draft, which payment the defendants refused. The plaintiff paid the first mentioned draft at maturity.

*Held*, that although the plaintiff, by acceptance and payment, was estopped from disputing the signature of the drawers, the Hamilton Cotton Company, to the bill, yet he was not estopped from denying their signature as endorsers, even though it was on the bill at the time of acceptance and payment.

*Held*, also that the defendants, having no title to the bill, the endorsement being a forgery, were not entitled to receive payment, and having been paid, the plaintiff was entitled to recover the amount so paid.

*Held*, also that the plaintiff was not estopped by his delay in discovering the forgery, there being no actual genuine party on the bill to whom the defendants might have recourse, and having lost no remedy by such delay.

*MacLennan, Q. C., and Haverson, for motion.*

*Bruce, Q. C., contra.*

#### RYAN V. BANK OF MONTREAL.

##### *Bills and notes—Estoppel—Forgery.*

The plaintiff made an arrangement in Toronto with one Hamilton Young, an employe of the Hamilton Cotton Company, to discount their draft on J. P. Billings & Co., of New York, for \$4,989.65, at three months, and in pursuance of this arrangement a draft was drawn in Hamilton, by Hamilton Young, in the name of the Hamilton Cotton Company, on the plaintiff, payable on demand to their own order for \$4,800, dated 23rd July, 1883. This draft was taken by Hamilton Young to the defendants' banking house at Hamilton, and there discounted by him and the proceeds of the discount drawn in cheques in the name of the company. The draft was then forwarded by the defendants to their house in Toronto, who presented the same to the plaintiff for acceptance and payment. The plaintiff then discounted the first mentioned draft with the defendants at Toronto, and with the proceeds paid the draft for \$4,800. The plaintiff, about the 11th September, 1883, discovered that both drafts had been forged by Hamilton Young,

#### RE SUMERFELDT V. WORTS.

##### *Gambling debt—Prohibition—Note of hand—Division Court Act.*

A note given in settlement of losses at matching coppers is a note of hand given in consideration of gambling debt within sec. 53, subsec. 3, R. S. O., ch. 47, and such a security is void under 9 Anne, ch. 14, even in the hands of a *bona fide* holder for value.

Upon proceedings being taken in the Division Court in an action in which that court has not jurisdiction, the defendant is entitled to prohibition immediately upon the action being brought and the fact of no notice of statutory defence being given under sec. 92 of R. S. O., ch. 47, does not affect the defendant's right to prohibition.

Q. B. Div.]

NOTES OF CANADIAN CASES.

[Q. B. Div]

## MACMILLAN v. G. T. R. Co.

*Common carriers—Shipment of goods to a point beyond defendants' line—Negligence—Release of co-defendants.*

The goods in question were shipped by plaintiff's agent in T. to the plaintiff at M., Man. After much delay some of the goods were delivered in a damaged condition by the C. P. R., whose line touches at M., and some were never delivered at all. Plaintiff brought his action for \$2,000 damages against the G. T. R., and subsequently the C. P. R. were made party defendants. The statement of claim charged the G. T. R. on the contract and the C. P. R. in tort. The G. T. R. set up a special contract, providing, amongst other things, for exemption from liability in case the goods were delayed, lost or damaged beyond their line, which ended at Fort G. Before trial plaintiff settled with the C. P. R. for \$650, and executed a release to them reserving his right to proceed against the G. T. R. for the balance, and notified the solicitor for the G. T. R. At the trial no reference was made to this release. The plaintiff's agent stated that the contract was a purely verbal one, and that he paid freight through to M., and received a receipt which he did not read, but forwarded it to the plaintiff. Defendants gave evidence that their contracts of shipment were always contained in a bill of lading (signed by the shipper and retained by the company), and in a corresponding shipping receipt (signed by the company and handed to the shipper). The goods in question were carried in a sealed car from T. to Fort G., and the car was still sealed when delivered to the next carriers *en route*. The learned Judge thought there was no evidence of negligence so far as the line of the G. T. R. extended, but it was not disputed that the goods had been damaged and lost by negligence before they reached the plaintiff.

The jury found that the contract was verbal. In answer to question put by the court, the foreman stated that the bill of lading was signed by one of the defendant's clerks, and that a receipt with the usual conditions endorsed was handed to plaintiff's agent at the time of shipment. Judgment was thereupon directed to be entered for defendants.

On motion by plaintiff to set aside this judg-

ment, and to have judgment entered for him for \$1,350, the balance claimed.

*Held*, that the contract, whether verbal or on one of the company's printed forms, was a through contract from T. to M., and that all corporations and persons employed *en route* were servants of the G. T. R. within the meaning of the Consol. R'y Act, 1879, sec. 25, subsec. 11, and that the loss having been admittedly occasioned by negligence, the defendants could not be relieved by any notice, condition, or declaration.

*Held*, also that notice of the value to the C. P. R. having been given by the G. T. R. before the trial the G. T. R. were not entitled to a new trial on the ground of surprise or the discovery of new evidence,

*Held*, also that the G. T. R. and C. P. R. were not joint contractors or joint tortfeasors, and that proof of the alleged release would not relieve the G. T. R. from liability.

## OLMSTEAD v. ERRINGTON.

*Division Court—Prohibition—Practice—Cost of application for writ—Entitling of affidavits—O. 7. A., secs. 23 and 25—Amendment—Marginal rule, 474.*

Where a defendant, upon being sued in the First Division Court in the county of Middlesex, filed a notice disputing the jurisdiction and served a notice of motion returnable before a Judge in Chambers for an order directing the issue of a writ of prohibition to the said Division Court to prohibit the Judge thereof and the plaintiff from proceeding with the suit in that Division Court on the ground of want of jurisdiction in that Court to hear and determine the same, but did not entitle his notice of motion, nor the affidavit in support of the motion, in any division of the High Court of Justice.

*Held*, (affirming the order of O'CONNOR, J., in Chambers, granting the writ) not a fatal objection, but one which could and should be amended (under Marginal Rule 474).

*Held*, also that although the motion for prohibition came on to be heard, the plaintiff in the Division Court caused the plaint to be transferred to the proper Division Court in the

Q. B. Div.]

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County of Lambton, nevertheless the defendant, upon being sued in a wrong Division Court, had the right to apply for prohibition, and the learned Judge in Chambers, having in his discretion given the defendant the costs of the motion for prohibition, that discretion could not be interfered with.

### QUEEN V. SHEVELEAR.

*Conviction for selling intoxicating liquors on voting day for Scott Act—The word "County," as used in the Act, means County for judicial and not for electoral purposes.*

The defendant was convicted of having sold intoxicating liquors on the 16th day of December, 1884, at the Township of Oakland, in the County of Brant, being the day on which the vote for the passage of the Canada Temperance Act for the County of Brant was taken.

The townships of Oakland and Burford, in the said County of Brant, had been, for the purposes of Dominion elections, separated from the County of Brant and annexed to the adjoining county.

Certain portions of the County of Brant consist of Indian lands, and the sale of liquor in these lands is regulated by the Indian Act of 1880, and amendments thereto.

*Held*, that the word "county," as used in the Act, means county for judicial and not for electoral purposes.

*Held*, also that under the eighth objection to the conviction that it did not appear that the votes of the electors on the Indian lands in the county were taken upon the petition for the Act, or that proper means were taken to enable them to exercise their franchise, or that they were permitted to exercise it, the proceedings by certiorari did not properly bring the matter before the court.

### NEWCOMBE V. ANDERSON ET AL.

*Replevin—Boarding-House Keeper—Lien—R. S. O. ch. 147.*

One J. and his wife took rooms in premises, called the "Shandon House," kept by defendants, partly furnishing them, and agreeing to pay \$50 a month therefor and for their board. They subsequently rented from plaintiff a piano.

*Held*, that the relation between defendants and J., was not that of an inn-keeper and guest, but of boarding-house keeper and boarder.

*Held*, also, that the piano was not part of the baggage of J. or his wife, and that under R. S. O. ch. 147, defendants had no lien upon it for their board.

*Quære*, whether the house kept by defendants was an "inn" within the meaning of R. S. O. ch. 147, s. 1.

*MacLaren*, Q.C., for plaintiff.

*Ritchie*, Q.C., contra.

### TUCKER V. McMAHON.

*Corroborative evidence—R. S. O. ch. 62, sec. 10.*

The plaintiff, after the death of her husband and about twenty-five years before action brought, went to live with testator, her son-in-law, a blacksmith by trade, residing with him as a member of his family up to the time of his wife's death, which took place about twelve years before action. She alleged that after her daughter's death, testator agreed that he would pay her wages if she would continue to live with him and take care of his family. She accordingly continued so to reside with him up to the time of his death in 1885, to which time she had received no wages whatever from him. In an action for wages against testator's executors, the plaintiff relied upon the evidence of a witness, that testator about two years before his death told witness "she (the plaintiff) shall be handsomely paid for what she does for me," and the evidence of G., another son-in-law, that two or three years before his death, testator said to the witness, speaking of plaintiff, that he would



[Prac.]

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[Prac.]

pay her well for her services. This was the only evidence in corroboration of plaintiff. It appeared, also, that testator by his will directed that upon his death all his property should be converted into money, and invested upon mortgage security, and the whole income thereof paid to plaintiff during her life; but there was no evidence to show the value of this bequest, and it was suggested that after payment of the testator's debts, the residue would be very small.

*Held*, that there was no sufficient corroboration of plaintiff's claim to satisfy R. S. O. ch. 62, sec. 10.

*T. G. Blackstock*, for motion.

*Aylesworth*, contra.

#### WEIR V. GRAPE VINE CO.

*Held*, that the grantee in a subsequent conveyance registered before the registry of a previous conveyance from the same grantor, of which the said grantee had no actual notice, was entitled to maintain an action to have his subsequent conveyance declared to have priority over the previous conveyance, and that this court had power to so order upon such terms as seemed just.

*W. Bell*, for motion.

*Osler, Q.C.*, contra.

#### PRACTICE.

Mr. Dalton, Q.C.]

[May 22.

Proudfoot, J.]

[May 31.

#### BROWN V. COUSINEAUX.

*Adding Parties—Rule 109, O. J. A.—Pleading.*

In an action for the price of goods sold, C., to whom the defendant had paid the price of the goods, believing him to have a better title than the plaintiff, and J. C. F., and A. F., who were charged by C. with having fraudulently obtained possession of the goods and made a pretended sale of them to the plaintiff, were added as parties defendant under Rule 109, O. J. A., with a direction that C. should in his

pleading, state his case against J. C. F. and A. F., and that they should be at liberty to reply.

*Shepley*, for the defendant and C.

*MacGregor*, for the plaintiff.

C. P. Div.]

[May 25.

#### HARE V. CAWTHROPE.

*Notice of trial—Joinder of issue—Close of pleadings—Counter-claim.*

The plaintiff delivered a reply to the defendant's statement of defence and counter-claim, simply stating that the plaintiff joined issue upon the defence and counter-claim.

*Held*, that this reply closed the pleadings, and notice of trial served with it was therefore regular.

*Shepley*, for the defendant.

*Aylesworth*, for the plaintiff.

Mr. Dalton, Q.C.]

[May 27.

#### CAMPBELL V. JAMES.

*Joinder of causes of action with claim for recovery of land—Rule 116, O. J. A.—Trial at which leave may be granted.*

Where the writ of summons was indorsed with a claim for the recovery of land and for mesne profits, but the statement of claim asked specific performance of the contract by the defendant to buy the land from the plaintiff, and, in the event of specific performance not being decreed, possession, etc., and no order had been obtained for leave to join another cause of action with a claim for the recovery of land as required by rule 116, and a motion was made to set aside the writ of summons and statement of claim or one of them.

*Held*, that the causes of action were improperly joined in the statement of claim without leave; but, inasmuch as the two causes of action could not conveniently be separately prosecuted, leave was given *nunc pro tunc*.

*Hoyles*, for the plaintiff.

*Shepley*, for the defendant.

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

O'Connor, J.] [May 28.  
 RE TAYLOR AND ONTARIO AND QUEBEC  
 Ry. Co.

*Award—Interest—Con. Ry. Act, 1879 (D.).*

Money was paid into the bank under Con. Ry. Act, 1879 (D.), sec. 9, sub-sec. 28, and an order for immediate possession of lands expropriated by the company was made by a judge under the same sub-section, and an award of compensation was subsequently made.

*Held*, that the land owner was entitled to interest on the amount awarded him, only at the rate allowed by the bank on the money paid in, and not at the legal rate.

*Leys*, for the land owner.

*MacMurphy*, for the company.

Proudfoot, J.] [May 31.

MULKINS V. CLARKE.

*Sale—Vendor's solicitor—Deposit—Default—Responsibility of vendor.*

Where the plaintiff's solicitor made default in payment into Court of the ten per cent. deposit paid to him at the time of sale.

*Held*, that the other parties entitled to the purchase money should not suffer thereby, but that the plaintiff's share should be charged with the deficiency.

*Watson*, for the plaintiff.

*Harcourt*, for the infants.

Mr. Dalton, Q.C.] [May 31.  
 Galt, J.] [June 4.

CONMEE ET AL. V. CANADIAN PACIFIC  
 Ry. Co.

*Staying trial—Interlocutory appeal.*

The trial of the action was stayed pending an appeal to the Supreme Court of Canada from the judgment of the Court of Appeal upon a question arising in the action as to the method of trial.

*Osler*, Q.C., for the plaintiffs.

*R. M. Wells*, for the defendants.

O'Connor, J.] [June 11.

REGINA EX REL. WILSON V. DUNCAN.

*Controverted election—Municipal Act, 1883—Master in Chambers, jurisdiction of.*

The Master in Chambers is not, in any sense, by delegation or otherwise, a judge of the High Court of Justice to whom power is given by the Municipal Act, 1883, to try and determine cases of controverted or disputed municipal elections.

*J. K. Kerr*, Q.C., for the testator.

*McMichael*, Q.C., for the respondent.

Galt, J.] [June 11.

McNAB V. OPPENHEIMER.

*Sheriff—Poundage—Arrest—No money made on execution.*

A sheriff, upon arresting a judgment debtor under a *ca. sa.*, thereby becomes at once entitled, as against the execution creditor, to full poundage on the amount of the execution.

*Aylesworth*, for the sheriff of York.

*Kappele*, for the plaintiff.

Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

O'Connor, J.]

[June 12.]

BOSWELL V. GRANT ET AL.

*Master in Ordinary, jurisdiction of—Consolidating actions—Judgment.*

The Master in Ordinary has no jurisdiction to consolidate actions in which judgments have been entered and in which references are pending in his office.

*E. H. E. Eddis*, for the plaintiff.

*Harrison*, for the defendants.

Boyd, C.]

[June 12.]

RE MONTEITH, MERCHANTS' BANK V.  
MONTEITH.

*Costs—Appeals—Administrator—Creditors—Rule 544, O. J. A.*

Costs of appeals are not carried by the words "Costs of suit as between solicitor and client," but require to be specially mentioned in the order for taxation.

The administrator is a necessary party to an administration writ, and as such should get his general bill of costs incurred in the ordinary proceedings in which he took part; but where an estate is insolvent the creditors are the persons really interested in the litigation, and it is for them, and not for the administrator, to take active steps by way of appeal to reduce the claims of the secured creditors. The administrator is entitled to attend upon the appeals and to tax a watching brief, but not such costs as if he were the principal litigant.

An appeal lies to a judge in Chambers from the decision of the Master in Chambers under Rule 544, upon appeal from a pending taxation.

*Rae*, for the secured creditors.

*J. A. Paterson*, for the unsecured creditors.

*MacGregor*, for the administrator.

Galt, J.]

[June 25.]

COCHRANE MANUFACTURING CO. V.  
LAWSON.

*Arrest—Ca. sa.—Discharge—Powers of local judge.*

A local judge of the High Court has no power to order the discharge of a defendant held in custody under a *ca. sa.* issued out of the High Court.

*Aylesworth*, for the plaintiffs.

*W. R. Meredith, Q.C.*, for the defendant.

Boyd, C.]

[June 29.]

GEORGE T. SMITH CO. V. GREY ET AL.

*Examination—Party resident out of jurisdiction—Conduct money—Objections.*

The president of the plaintiff's company lived in the United States, but being in Toronto he was there subpoenaed on the 22nd April to attend on the 28th April for examination for discovery before a special examiner at Toronto. He was paid \$1, and made no objection as to the amount, nor did he object that he was prevented by engagements from being present on that day, but he failed to attend.

*Held*, that the president should have attended for examination on the day appointed, and that the fact that there were then pending against him, at the instance of a stranger to this action, proceedings for perjury which might affect some point in controversy in this action, though it might be a reason for his refusing to answer any question on this point, was not a reason for his refusing to attend at all, and the president was ordered to attend for examination at Toronto at his own expense.

*Arnoldi*, for the plaintiffs.

*H. D. Gamble*, for the defendants.

Prac.]

NOTES OF CANADIAN CASES—FLOTSAM AND JETSAM.

Boyd, C.]

[July 2.

RE PHILBRICK AND THE ONTARIO AND  
QUEBEC RY. CO.*Award—Interest—Con. Ry. Act, 1879 (D.)—  
Arbitrators' fees—Summary order.*

An order was obtained for immediate possession of land under the Con. Ry. Act, 1879 (D.), and money was paid into the Canadian Bank of Commerce under the same sub-section by the company.

*Held*, that the land owner was entitled to interest upon the amount subsequently awarded him from the date of the award, only at the rate allowed by the bank upon a deposit and not at the legal rate of six per cent.

It was determined in this matter that neither party was entitled to the costs of arbitration under the statute; but the company, in order to take up the award, paid the whole of the arbitrators' fees.

*Held*, that a summary order could not be made to recoup the company for one-half the fees out of the moneys payable to the land owner, and such order was refused without prejudice to an action for the same purpose.

*Alfred Hoskin, Q.C.*, for the land owner.

*G. Tate Blackstock*, for the company.

**FLOTSAM AND JETSAM.**

**ACCIDENT POLICY—SUICIDE.**—In our last issue we noticed the very interesting case of *Crandall v. Accident, etc., Co.*, in which it was held that when a person holding an accident policy commits suicide by hanging himself while insane, his death is in contemplation of law an accident within the policy, and that the insurance company is liable. The policy excepted death caused "wholly or in part by bodily infirmities or disease." Approving the general line of argument which led to this conclusion, we asked: "Now has this expression, 'in part' no significance whatever? And, if any, what does it mean? Can it be that under that expression a remote cause can be admitted to be 'in part,' and concurrently with the proximate, the cause of death? Cannot the insanity of the person who took his own life be regarded in part the cause of his death? On this point we are entirely satisfied."

Since writing this our attention has been called to several authorities, which tend strongly to an-

swer our questions in favour of the conclusion reached by the court. In one of the cases (*Lawrence v. Accidental, etc.*, 1 L. R. (Q. B. Div.) 216), there was an exception in the policy of deaths caused by "fits," and yet the court held that the assured having a fit, and while in it falling on the track of a railway and being immediately killed by a locomotive, died by accident and not by the fit. And in that case the policy excepted deaths caused by fits, "directly or jointly with accidental injury." The word "jointly" in this case seems to be equivalent to the words "in part" as used in the Crandall policy. The court said in this case: "But it is essential that it should be made out that the fit was a cause in the sense of being the proximate and immediate cause of death." From this it would seem that the disease or disability which is excepted in the policy must be "jointly," or "in part," concurrent with the accident in the proximate cause of the death. It is not sufficient that it renders possible the proximate cause of death, the accident. If this is as we are inclined to think the proper view, the insanity in the Crandall case and the fit in the *Lawrence* case were not parts of the proximate cause of death, but the secondary or remote cause the *causa causans*, and cannot therefore be regarded as operating "jointly or in part" with the accident to produce the death. An analogous case may be cited in support of this view (*Carter v. Towne*, 103 Mass., 507). A man sold gunpowder to a small boy, he kept it several days with the knowledge of his mother, and afterwards was injured by its explosion. Suit was brought against the vendor, but the court held that he was not legally responsible, that the sale of the powder was not the immediate or proximate cause of the injury. And yet the sale of the powder to the boy rendered explosion possible, just as the insanity rendered possible the accident by which Mr. Crandall came to his death.

There is, however, another reason equally strong, perhaps stronger, why the saving clause, relied upon to protect the insurance company, should fail to do so. That clause is an exception to the general obligation which the company assumed. The rule is that words of exception shall be construed, in cases of doubt, most strongly against the party in whose favour they are introduced (2 Whart Contr., s. 677). If, therefore, there is any doubt whether by the "in part" exception was meant a proximate cause or remote cause, the construction should be that the cause meant was a proximate cause, and that construction would manifestly defeat the defence relied upon.—*Central Law Journal*.

## LAW SOCIETY OF UPPER CANADA.

## Law Society of Upper Canada.



## OSGOODE HALL.

## HILARY TERM, 49 VICT., 1886.

During Hilary Term the following gentlemen were called to the Bar, namely: Messrs. Edward K. C. Martin and George L. Taylor, who passed their examination for Call last Term, and Messrs. Ernest Frederick Gunther, John Greer, Daniel Coughlin, Albert Edward Kennedy, Francis Robert Latchford, Frederick Weir Harcourt, Henry Wissler, Alfred Mitchell Lafferty, Thomas Davy Jermyn Farmer, John Wendell McCullough, Jos. Nason, Frederick Sheppard O'Connor, William Edward McKeough, Robert Bertram Beaumont, Charles Franklin Farewell.

The following gentlemen were granted Certificates of Fitness, namely: Messrs. J. A. McIntosh, W. D. McPherson, H. J. Wright, T. B. Lafferty, M. Wilkins, Jr., T. D. J. Farmer, C. E. Fleming, J. Nason, A. B. Shaw, W. Morris, A. S. Campbell, R. Walker, E. A. Wismer, E. M. Yarwood, W. E. McKeough, J. F. Williamson, H. Wessler, R. B. Beaumont, J. S. Mackay, D. Coughlin, J. Thacker, W. B. Raymond, J. W. McCullough, A. McKechnie, G. E. Martin.

The following gentlemen were admitted as students-at-law, namely:

*Graduates.*—Victor Crossley McGirr, Archibald Weir, Isaac Newlands.

*Matriculants.*—Frederick William Hill, Arthur Franklin Crowe, Edward Lindsay Middleton, James Hamilton McCurry, Robert Ernest Gemmell, Hugh James Minhinick, Merritt Oaklands Sheets, A. E. Slater.

*Juniors.*—George Edmund Jackson, John Agnew, George Turbill Falkiner, Dighton Winans Baxter, Charles Edwin Oles, Charles James Notter, William Carnew, Henry Lumley Drayton, Charles Franklin Gilchriese, Edward John Harper, William Herbert Cawthra, John Francis Lennox, Augustus Grant Malcolm, Honore Chataleine.

*Articled Clerk.*—Alfred James Fitzgerald Sullivan passed the Articled Clerks' Examination.

## SUBJECTS FOR EXAMINATIONS.

*Articled Clerks.*

- 1884 and 1885. { Arithmetic.  
Euclid, Bb. I., II., and III.  
English Grammar and Composition.  
English History—Queen Anne to George III.  
Modern Geography—North America and Europe.  
Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

*Students-at-Law.*

1884. { Cicero, Cato Major.  
Virgil, Æneid, B. V., vv. 1-361.  
Ovid, Fasti, B. I., vv. 1-300.  
Xenophon, Anabasis, B. II.  
Homer, Iliad, B. IV.
1885. { Xenophon, Anabasis, B. V.  
Homer, Iliad, B. IV.  
Cicero, Cato Major.  
Virgil, Æneid, B. I., vv. 1-304.  
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

## ENGLISH.

A Paper on English Grammar.  
Composition.

Critical Analysis of a Selected Poem:—

- 1884—Elegy in a Country Churchyard. The Traveller.  
1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

## FRENCH.

- A paper on Grammar,  
Translation from English into French prose.  
1884—Souvestre, Un Philosophe sous les toits.  
1885—Emile de Bonnechose, Lazare Hoche.

## LAW SOCIETY OF UPPER CANADA.

## OF NATURAL PHILOSOPHY.

*Books*—Arnett's elements of Physics, and Somerville's Physical Geography.

*First Intermediate.*

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

*Second Intermediate.*

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

*For Certificate of Fitness.*

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

*For Call.*

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any University in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission to the books of the society as a Student-at-Law, on conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received a degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchler, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six

## LAW SOCIETY OF UPPER CANADA.

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchler, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## F E E S .

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above .....	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

## PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890.

*Students-at-law.*

## CLASSICS.

1886.	{ Cicero, Cato Major.
	{ Virgil, Æneid, B. I., vv. 1-304.
	{ Cæsar, Bellum Britannicum.
	{ Xenophon, Anabasis, B. V.
	{ Homer, Iliad, B. VI.
1887.	{ Xenophon, Anabasis, B. I.
	{ Homer, Iliad, B. VI.
	{ Cicero, In Catilinam, I.
	{ Virgil, Æneid, B. I.
	{ Cæsar, Bellum Britannicum.
1888.	{ Xenophon, Anabasis, B. I.
	{ Homer, Iliad, B. IV.
	{ Cæsar, B. G. I. (vv. 1-33.)
	{ Cicero, In Catilinam, I.
	{ Virgil, Æneid, B. I.
1889.	{ Xenophon, Anabasis, B. II.
	{ Homer, Iliad, B. IV.
	{ Cicero, In Catilinam, I.
	{ Virgil, Æneid, B. V.
	{ Cæsar, B. G. I. (vv. 1-33)
1890.	{ Xenophon, Anabasis, B. II.
	{ Homer, Iliad, B. VI.
	{ Cicero, In Catilinam, II.
	{ Virgil, Æneid, B. V.
	{ Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

## MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

## ENGLISH.

A Paper on English Grammar.

Composition.

Critical reading of a Selected Poem:—

1886—Coleridge, Ancient Mariner and Christabel.

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Child Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

## HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe. Optional Subjects instead of Greek:—

## FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886

1888 } Souvestre, Un Philosophe sous le toits.

1890

1887 } Lamartine, Christophe Colomb.

1889

## OR, NATURAL PHILOSOPHY.

*Books*—Arnot's Elements of Physics; *or* Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

## ARTICLED CLERKS.

Cicero, Cato Major; *or*, Virgil, Æneid, B. I., vv. 1-304, in the year 1886; and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe. Elements of Book-Keeping.

*Copies of Rules can be obtained from Messrs Rowsell & Hutcheson.*

# Canada Law Journal.

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No. 15.

## DIARY FOR SEPTEMBER.

- 1. Wed... Barristers' examinations, Long vac. in H. C. J. ends.
- 2. Thur... Sittings of Div. Ct. Ch. Div. H. C. J. begin.
- 3. Fri... Sir Edward Coke died 1634 *set. 82.*
- 4. Sat... 11th Sunday after Trinity.
- 5. Mon... Trinity term of Law Society begins.
- 6. Tues... Sittings of Court of Appeal begin.
- 7. Thur... Revolted American Prov. first called "the U. S." 1776.
- 8. Sat... 12th Sunday after Trinity.
- 9. Mon... Battle of Quebec and death of Gen. Wolfe 1759.
- 10. Tues... Duke of Wellington died 1852. Sir J. S. Copley (after Lord Lyndhurst) app. Master of the Rolls, 1826.

## TORONTO, SEPTEMBER 1, 1886.

THE case of *Re X.* (a solicitor), 54 L. T. N. S., 634, ought to serve as a warning to solicitors in preparing conditions and particulars of sale. The solicitor in question, being instructed to sell certain property for a client, inserted in the particulars a statement that an arrangement had been made for a license to convert the property in question into shops. No definite arrangement had in fact been made. One of the conditions of sale stipulated that the purchaser should be deemed to purchase with full knowledge of the terms of the offer to grant such license, and that the vendor would not be bound in any way to carry out such terms or obtain such license. The purchaser objected to carry out the sale on the ground of the untrue statement in the particulars. By the advice of counsel an application was then made under the Vendors and Purchasers Act to compel the purchaser to complete, on the ground that his objection was precluded by the condition of sale. The judge of first instance decided in favour of the vendor, but on appeal his decision was reversed, and it was held

that the condition could not get rid of the positive statement in the particulars. The sale consequently fell through. Upon a taxation of costs between the vendor and his solicitor the costs of the abortive attempt at a sale and of the proceedings under the Vendors and Purchasers Act were all disallowed by the taxing master, and on appeal Bacon, V.C., affirmed the disallowance.

WE have before us the report of a special committee on the establishment of a department of law in connection with Cornell University, with a preliminary announcement of the action of the trustees in establishing such a department.

The report takes up and deals in an able and exhaustive manner with the subject before us under the following heads:—

"Importance of Education in the Law;" "Are Provisions for Legal Education already ample?" "As to whether a Legal Education, wholly or in part in a Law School, is better than such an Education secured exclusively in a private office;" "As to whether the Establishment of a Law School is compatible with the fundamental laws of the University;" "As to whether larger results would be likely to follow the expenditure necessary for a Law School than would follow an expenditure of the same amount in any other way;" "The financial requirements of a Law School."

That part of the report of most interest to us is as to whether a legal education in part or wholly in a Law School is better than such an education secured exclusively in law offices. The report on this subject uses the language of the com-



## LEGAL EDUCATION.

mittee of the American Bar Association, which in 1881 gave the gist of the opinions communicated to them by some of the best men in the profession in the United States, in the following words:—

"There is little if any dispute as to the relative merit of education by means of law schools, and that to be got by mere practical training or apprenticeship as an attorney's clerk. Without disparagement of mere practical advantages the verdict of the best informed is in favour of the schools. The benefits which they offer are easily suggested, and are of the most superior kind. They afford a student an acquaintance with general principles, difficult, if not impossible, to be otherwise attained; they serve to remove difficulties which are inherent in scientific and technical phraseology; and they, as a necessary consequence, furnish the student with the means for clear conception, and accurate and precise expression. They familiarize him with leading cases, and the application of them in discussion. They give him the valuable habit of attention, teach him familiar maxims, and offer him the priceless opportunities which result from contact and generous emulation. They lead him readily to survey law as a science, and imbue him with the principles of ethics as its true foundation."

The report before us then takes up the parable, as follows:—

"In addition to these statements in regard to the positive advantages of the kind of instruction afforded by a good law school attention is called to the fact that many a young man who has plodded his solitary way through Blackstone and Kent, in the office of some busy lawyer, who seldom has time to speak to him except to ask him to do an errand or copy a paper, has no adequate equipment for the modern requirements of the profession. If this be regarded as an extreme case it will have to be admitted that even the best advantages of an education in a law office are greatly reinforced by a systematic course of study in a law school.

"On this same subject there are some striking statements in the Inaugural Lecture of Mr. Girard B. Finch, the new Law Lecturer at Cambridge in England. The subject of Mr. Finch's Inaugural

Lecture was: 'Legal Education; its Aim and Method.' One passage in his address may well be quoted:

"During my stay in Boston last spring, men engaged in legal practice spoke to me of the great value of law teaching at Harvard University. Mr. Sidney Bartlett, the father of the Massachusetts Bar, told me that the three years' course at Harvard was equal to seven years' work in an office. Mr. Justice Oliver Wendell Holmes, Jr., and Dr. Eliot, President of the University, spoke to the same effect. Dr. Eliot related with pardonable pride, that at the recent dinner of old Harvard men, a prominent young advocate had declared that when he was a student, he had often heard it said that the course at Harvard was equal to ten years of actual work; that he was then incredulous; but that after being in practice for ten years he came to know it as a fact."

"It seems to us that there is no answer that will counterbalance evidence of this kind, although it is doubtless a fact that in studying in an office a student acquires a certain readiness in what may be called the 'technique' of the law that cannot be acquired very well in connection with a law school. The force of this objection—surely not very strong in itself—is entirely broken by the fact that any student of aptitude is likely to have ample time to acquire such details in the first years of his practice in the profession. Even if that were not the case, the objection would be fairly met by recommending that a portion of the time of study before admission to the Bar be spent in an attorney's office, as is now required in this State. The objection can in no way disturb the overwhelming advantage of such scientific training as can only be obtained where scientific instruction is given. To suppose that any education can be as well gained at haphazard, as at a school where effort is made to impart instruction in the most approved manner, is to suppose what, on the face of it, is nothing less than an absurdity."

It is hard to get over this reasoning and testimony. Feeling the force of it one turns naturally to the discussion for ourselves of the same question as is answered by this report for the American Bar:

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"Are provisions for legal education already ample?" This question is local, and there would be little use in quoting the views of this committee on that part of the subject. We need, however, scarcely go into this matter at much length, for it must be admitted that we have made but little progress in Canada in this respect. It is, we think, to the University of Toronto, and not to the Law Society, that we must look for aid in this matter. An effort in the direction of a Law School was once made by our Society, but the result, so far as it went, was not a success. Some thought the undertaking too large; others complained that it was not used or appreciated; whilst others thought that success would probably have been obtained by perseverance. The fact is the student requires the quiet training of the school as well as the busy practice of an office, and these two things cannot be had at the same time. The subject is an important one and well worthy of attention, and we shall gladly find space for the views of those who may feel disposed to enlarge upon it.

## NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

### SUPREME COURT OF CANADA.

McDONALD (Defendant) Appellant, and  
McPHERSON (Plaintiff), Respondent.

*Bill of lading—Assignment of—Property in goods  
under—Stoppage in transitu—Replevin.*

Appeal from the Supreme Court of Nova Scotia.

H. of Souris, P.E.I., carried on the business of lobster packing, sending his goods to M., of Halifax, N.S., who supplied him with tin plates, etc. They had dealt in this way for several years when, in 1882, H. shipped 180 cases of beef via Pictou and I. C. R., addressed to M. The bill of lading for this shipment was sent to M., and provided that the goods were to be delivered at Pictou to the freight agent of the I. C. R. or his assigns, the freight to be payable at Halifax; M., the consignee, being on the verge of insolvency, indorsed the bill of lading to McM. to secure accommodation acceptance. H. drew on M. for the value of the consignment, but the draft was not accepted, and H. then directed the agent of the I. C. R. not to deliver the goods. The goods had been forwarded to Pictou, and the agent there telegraphed to the agent at Halifax to hold them. McM. applied to the agent at Halifax for the goods and tendered the freight, but delivery was refused. In a replevin suit against the Halifax agent,

*Held* (affirming the judgment of the court below, HENRY, J., dissenting), that the goods were sent to the agent at Pictou to be forwarded, and that he had no other interest in them, or right or duty connected with them than to forward them to their destination, and could not authorize the agent at Halifax to retain them.

*Held*, also, that whether or not a legal title to the goods passed to McM., the position of the agent in retaining the goods was simply

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that of a wrong-doer, and McM. had such an equitable interest in such goods and right to the possession thereof, as would prevent the agent from withholding them.

Appeal dismissed with costs.

Henry, Q.C., for appellant.

Graham, Q.C., for respondent.

LONDON AND CANADIAN LOAN COMPANY,  
SIDNEY S. HAMILTON and ROBERT B.  
HAMILTON (by original writ) (Defendants),  
Appellants, v. GEORGE WARIN and  
JAMES WARIN (Plaintiffs), Defendants.

*Navigation—Interference with—Public navigable waters—Water lots—Crown grant—Easement—Trespass.*

An appeal from the Court of Appeal for Ontario.

W. was lessee, under lease from the city of Toronto, of certain water lots held by the city under patent from the Crown, granted in 1840, the lease to W. being given by authority of the said patent and of certain public statutes respecting the construction of the esplanade, which formed the northern boundary of said water lots.

*Held* (affirming the judgment of the court below), that such lease gave to W. a right to build as he chose upon the said lots, subject to any regulations which the city had power to impose, and doing so to interfere with the right of the public to navigate the waters.

*Held*, also, that the said waters being navigable parts of the Bay of Toronto, no private easement could be acquired therein while they remained open for navigation.

Appeal dismissed with costs.

Arnoldi, for appellants.

Christopher Robinson, Q.C., and T. P. Galt, for respondents.

RE STANDARD FIRE INSURANCE CO.,  
(Caston's case).

*Joint Stock Co.—Contributories—Subscription for stock.*

On appeal from the Court of Appeal for Ontario.

The Act of Incorporation of a Joint Stock Co., provided "that no subscription for stock

should be legal or valid until ten per cent. should have been actually and *bona fide* paid thereon."

C. gave to the manager of the Co. a power of attorney to subscribe for him ten shares in the Co., the power of attorney containing these words, "and I herewith enclose ten per cent. thereof, and ratify and confirm all that my said attorney may do by virtue thereof." The ten per cent. was not, in fact, enclosed, but the amount was placed to the credit of C. in the books of the Co., and the certificate of stock issued to him, which he held for several years.

The Co. having failed, proceedings were taken to have C. placed on the list of contributories, in which proceedings he gave evidence to the effect that the sum to his credit was for professional services to the Co., he having been appointed a local solicitor, and there had been an arrangement that his stock was to be paid for by such services.

*Held* (affirming the judgment of the court below, HENRY, J., dissenting) that C. was rightly placed on the list of contributories.

Appeal dismissed with costs.

A. C. Galt, for appellant.

Bain, Q.C., for respondent.

CANADA SOUTHERN RY. CO. (Defendants),  
Appellants, v. CLOUSE (Plaintiff), Respondent.

*Farm crossing—Liability of railway company to provide—Agreement with agent of company—14 & 15 Vict. cap. 51, sec. 13—Substitution of "at" for "and" by Consolidated Statutes of Canada, cap. 66, sec. 13.*

On appeal from the Court of Appeal for Ontario.

The C. S. R. Co., having taken for the purposes of their railway the lands of C., made a verbal agreement with C. through their agent T. for the purchase of such lands, for which they agreed to pay \$662, and they also agreed to make five farm crossings across the railway on C.'s farm, three level crossings and two under crossings; that one of such under crossings should be of sufficient height and width to admit of the passage through it, from one part of the farm to the other, of loads of grain and hay, reaping and mowing machines;

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and that such crossings should be kept and maintained by the company for all time for the use of C., his heirs and assigns. C. wished the agreement to be reduced to writing, and particularly requested the agent to reduce to writing and sign that part of it relative to the farm crossings, but he was assured that the law would compel the company to build and maintain such crossings without an agreement in writing. C. having received advice to the same effect from a lawyer whom he consulted in the matter, the land was sold to the company without a written agreement and the purchase money paid.

The farm crossings agreed upon were furnished and maintained for a number of years until the company determined to fill up the portion of their road on which were the under crossings used by C., who thereupon brought a suit against the company for damages for the injury sustained by such proceeding, and for an injunction.

*Held* (RITCHIE, C.J., and FOURNIER, J., dissenting), that the evidence showed that the plaintiff relied upon the law to secure for him the crossings to which he considered himself entitled, and not upon any contract with the company, and he could not therefore compel the company to provide an under crossing through the solid embankment formed by the filling up of the road, the cost of which would be altogether disproportionate to his own estimation of its value and of the value of the farm.

*Held*, also, that the company were bound to provide such farm crossings as might be necessary for the beneficial enjoyment by C. of his farm, the nature, location and number of said crossings to be determined on a reference to the Master of the Court below. *Brown v. The Toronto and Nipissing Ry. Co.*, 26 U. C. C. P. 206, overruled.

*Semble*, the substitution of the word "at" in sec. 13 of cap. 66 of the Consolidated Statutes of Canada for the word "and" in sec. 13 of cap. 51 of 14 & 15 Vict. is the mere correction of an error, and was made to render more apparent the meaning of the latter section, the construction of which it does not alter nor affect.

Appeal allowed with costs.

*Cattanach*, for appellants.

*McCarthy*, Q.C., and *Robb*, for respondent.

CANADA SOUTHERN RY. CO. (Defendants),  
Appellants, v. ERWIN (Plaintiff), Re-  
spondent.

*Farm crossing—Agreement for cattle pass—Construction of—Liability of railway company to maintain—Substitution of solid embankment for trestle bridge.*

In negotiating for the sale of lands taken by the Canada Southern Railway Company for the purposes of their railway, the agent of the company signed a written agreement with the owner, which contained a clause to the effect that such owner should have "liberty to remove for his own use all buildings on the said right of way, and that in the event of their being constructed on the same lot a trestle bridge of sufficient height to allow the passage of cattle, the company will so construct their fence to each side thereof, as not to impede the passage thereunder."

*Held* (reversing the judgment of the court below, RITCHIE, C.J., dissenting), that under this agreement the only obligation on the company was to maintain a cattle pass so long as the trestle bridge was in existence, and did not prevent them from discontinuing the use of such bridge and substituting a solid embankment therefor, without providing a pass under such embankment.

Appeal allowed with costs.

*Cattanach*, for appellants.

*McCarthy*, Q.C., and *Robb*, for respondent.

WINDSOR HOTEL COMPANY v. CROSS.

*Promise to pay a cessionnaire without reserve—Garant—Compensation, plea of—Interest, agreement as to.*

On the 28th June, 1877, the appellants entered into an agreement before Hunter, N. P., by which, without any reserve they acknowledged to owe and promised to pay certain sums of money (amongst others) to one Mrs. L., transferee of one of the vendors of the property upon which the appellants company's hotel is now built, and who had sold with warranty. Subsequently Mrs. L., on the 15th June, 1880, by notarial deed, transferred to the respondent the balance payable to her, and the transfer was duly signified to the company. In 1883, the respondent sued the ap-

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pellants for \$2231.37, the balance then due her and the interest under said deeds. To this action the appellants pleaded, *inter alia*, that interest was due from 1st July, 1881 only, the parties having agreed to waive the right to exact interest until the net revenue of the hotel should be sufficient to pay the annual liability for interest, insurance, etc., which was the case only from the 1st July, 1881, and that they were entitled to oppose in compensation a larger sum paid to the Corporation of Montreal for assessment imposed under 42 and 43 Vict. cap. 53 (P. Q.), which statute was passed after the purchase. To this the respondent replied that the appellants had accepted Mrs. L. as a new creditor delegated to receive payment, and had waived all pretension or grounds which they might have set up against their vendors, and that all assessments imposed or attempted to be imposed prior to 42 and 43 Vict. cap. 53, were null and void and had been so declared.

The Superior Court held that the compensation pleaded had taken place, and dismissed the respondent's action.

On appeal, this judgment was reversed by the Court of Queen's Bench for the following, amongst other reasons, that neither the respondent nor her *outeur* Mrs. L. were *garants* of the company, and that the respondent was entitled to be paid, notwithstanding any claim the said company might have against their vendors under the warranty stipulated in their deed of sale. On appeal to the Supreme Court of Canada,

*Held*, that the above reason given by the Court of Queen's Bench was sufficient to dismiss the appellants' plea of compensation.

*Held*, also, (on cross appeal, affirming the judgment of the court below), that interest should only be charged since 1st July, 1881.

Appeal dismissed with costs, and cross appeal dismissed with costs.

*Pagnuelo*, Q.C., for appellants.

*Geoffrion*, Q.C., for respondents.

JAMES FLANAGAN AND JOANNA FLANAGAN (Defendants), Appellants, and JOHN DOE on demise of R. ELLIOTT, ET AL. (Plaintiffs), Respondents.

*Assessment on real estate—In name of occupier—Description as to persons and property—Con. Stat. (N. B.), ch. 100, sec. 16—Several assessments in one warrant—Illegal assessment in.*

On appeal from the Supreme Court of New Brunswick.

The Consolidated Statutes of New Brunswick, sec. 16 of ch. 100 Con. Stat. of New Brunswick, and relating to rates and taxes, provides that "real estate, where the assessors cannot obtain the names of the occupier or person having ostensible control, but under such description as to persons and property . . . as shall be sufficient to indicate the property assessed, and the character in which the person is assessed."

J. G., the owner of real estate in Westmoreland County, N. B., died, leaving a widow who administered to his estate and resided on the property. The property was assessed for several years in the name of the estate of T. G., and in 1878 it was assessed in the name of "Widow G."

*Held* (affirming the judgment of the court below), that the last named assessment was illegal, as not comprising such description of persons and property as would be sufficient to indicate the property assessed and the character in which the person was assessed.

When a warrant for the collection for a single sum for rates for several years included the amount of an assessment which did not appear to be either against the owner or the occupier of the property.

*Held* (affirming the judgment of the court below), that the inclusion of such assessment would vitiate the warrant.

Appeal dismissed with costs.

*Borden*, for appellants.

*R. Barry Smith*, for respondents

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**TROOP and LEWIS (Plaintiffs), Appellants  
v. MERCHANTS' MARINE INSURANCE CO.  
(Defendants), Respondents.**

*Marine Insurance—Insurance on freight—Constructive total loss—Abandonment—Repairs by underwriters.*

On appeal from the Supreme Court of Nova Scotia.

A vessel proceeding on a voyage from Areibo to Acquim and thence for New York, encountered heavy weather, was dismasted and towed into Guantanamo. The underwriters of the freight sent an agent to Guantanamo to look after their interests, and the master of the vessel, under advice from the owners, abandoned her to such agent and refused to assist in repairing the damage and complete the voyage. The agent had the vessel repaired and brought her to New York with the cargo. On an action to recover the insurance on the freight,

*Held* (reversing the judgment of the court below), that there being a constructive loss of the ship, the action of the underwriters in making the repairs and earning the freight would not prevent the assured from recovering.

Appeal allowed with costs.

*Graham, Q.C.*, for appellants.

*Henry, Q.C.*, for respondents.

**CANADA ATLANTIC RAILWAY CO. and LON-  
LEY (Plaintiffs), Appellants, v. CITY OF  
OTTAWA (Defendants), Respondents.**

*Municipal corporation—By-law—36 Vict. c. 48  
Ont.—Bonus to railway—Vote of ratepayers on  
by-law for—Premature consideration of by-law  
—Error in copy submitted to ratepayers—Sign-  
ing and sealing by-law—To be passed by same  
council.*

On appeal from the Court of Appeal for Ontario.

A by-law was submitted to the council of the city of O. under 36 Vict. c. 48, for the purpose of granting a bonus to a railway then in course of construction, and after consideration by the council it was ordered to be submitted to the ratepayers for their vote. By the notice published in accordance with the provision of the statute, such by-law was to be

taken into consideration by the council after one month from its first publication on the 24th September, 1873. The vote of the ratepayers was in favour of the by-law, and on October 20th a motion was made in the council that it be read a second and third time, which was carried, and the by-law passed. The mayor of the council, however, refused to sign it on the ground that its consideration was premature, and on November 27th the same motion was made and the by-law was rejected. Nothing more was done in the matter until April, 1874, when a motion was again made before the council that such by-law be read a second and third time, which motion was, on this occasion, carried. At this meeting a copy only of the by-law was before the council, the original having been mislaid, and it was not found until after the commencement of this suit. When it was found it was discovered that the copy voted on by the ratepayers contained, by mistake of the printers, a date for the by-law to come into operation different from that of the original. In 1883 an action was brought against the corporation of the city of O. for the delivery of debentures provided for by the city by-law, in which suit the question of the validity of the whole proceedings was raised.

*Held* (affirming the judgment of the court below),

1. That the vote of November 20th, 1873, was premature, and not in conformity with the provisions of sec. 231 of the Municipal Act, and that the mayor properly refused to sign it, and that without such signature the by-law was invalid under sec. 226.

2. That the council had power to consider this by-law on November 5th, 1873, and the matter was then disposed of.

3. That the proceedings of April 7th, 1874, were void for two reasons—one that the by-law was not considered by the council to which it was first submitted as provided by sec. 236, which is to be construed as meaning the council elected for the year and not the same corporation; and the other reason is that the by-law passed in 1874 was not the same as that submitted, there being a difference in the dates.

*Seemle*, that the functions of a municipality in considering a by-law after it has been voted

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on by the ratepayers are not ministerial only, but the by-law can be confirmed or rejected irrespective of the favourable vote.

Appeal dismissed with costs.

*McCarthy*, Q.C., *O'Gara*, Q.C., and *Gormully*, for appellants.

*MacTavish*, for respondents.

## QUEEN'S BENCH DIVISION.

### BAKER V. ATKINSON ET AL.

*Determination of lease by forfeiture—Right to distrain—8 Anne ch. 14, sec. 6, 7—Money paid—Right to recover back—Provision for a year's rent payable on assignment for creditors—Validity of.*

Defendants in 1881, by indenture under the Short Forms Act, leased certain premises to O. for ten years, at a yearly rent payable quarterly in advance, with a covenant that if the lease should be taken in execution, or if the lessees should make any assignment for the benefit of creditors, the lease should immediately become forfeited and void, and the next ensuing one year's rent should be at once due and payable. There was also a proviso for re-entry on nonpayment of rent or seizure in forfeiture of the term for any of the causes aforesaid. In August, 1883, O. assigned to B. as trustee for the benefit of creditors, who went into possession, whereupon defendants distrained for six months' rent then in arrear, and one year's rent payable in consequence of the assignment. Three executions were soon after placed in the sheriff's hands, and the solicitors for the plaintiffs under the first and third executions paid the rent claimed to prevent the sale of the goods by defendants and B., though not admitting defendants' right to it. The sheriff afterwards sold for less than the executions, and repaid the solicitors.

*Held*, that the distress was illegal, for the Statute of Anne, ch. 14, sec. 6, applies only to cases where the tenancy has been determined by lapse of time, and not by forfeiture; and that the plaintiff B. was entitled to recover the amount received by defendants.

*Taylor v. Lang*, 10 O. R. 248, not followed.

*Per ARMOUR*, J.—The year's rent became due only by virtue of the forfeiture. The distress was an unequivocal act, indicating the intention to forfeit,

and evidence of such an intention previously formed, so that before the distress defendants had elected to treat the term as forfeited, and having done so, their right to distrain was at an end. Moreover they had not distrained during the possession of the tenant from whom the rent became due, and even if defendants had a right to distrain, the provision making one year's rent payable was fraudulent as against creditors. *Quare*, *per WILSON*, C.J., as to this latter point.

*Per ARMOUR*, J.—The execution creditors for whom the money was paid in order to enable the sheriff to seize under these executions might also recover, *WILSON*, C.J., doubting.

*Moss*, Q.C., for plaintiffs.

*Robinson*, Q.C., and *Atkinson*, Q.C., contra.

Galt, J.]

### REGINA V. MARSHALL.

*Hawkers and peddlers—Con. Mun. Act, 1883, sec. 495, sub-sec. 3, as amended by 48 Vict. chap. 40 (O.)—Conviction under county by-law—Meaning of word "agents" in amending Act.*

*Held*, that under 48 Vict. chap. 40, sec. 1 (O.), amending sub-sec. 3 of sec. 495 of the Con. Mun. Act, 1883, a member of a firm carrying and exposing samples, or making sales of tea, etc., is not within the restriction preventing "agents for persons not resident within the county" from so doing, and is not such an agent.

Galt, J.]

### REGINA V. BASSETT.

*Hawkers and peddlers—Con. Mun. Act, 1883, sec. 495, sub-sec. 3, as amended by 48 Vict. chap. 40 (O.)—Conviction under county by-law—Exposing samples of cloth and soliciting orders for clothing—Meaning of term "dry goods" in amended Act.*

*Held*, that under 48 Vict. chap. 40, sec. 1 (O.), amending sub-sec. 3 of sec. 495 of the Con. Mun. Act, 1883, it is no offence to expose samples of cloth and solicit orders for clothing to be afterwards manufactured from such cloth, and to be then delivered to the persons giving such orders.

*Held*, also, that the term "dry goods" in the amended Act does not include clothing ordered to be manufactured from cloths, samples of which are exposed with a view to solicit orders for such clothing.

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## CHANCERY DIVISION.

Boyd, C.]

[June 3.]

## SWEET ET AL. V. PLATT ET AL.

*Will—Devise—Limitation to offspring—Life estate of ancestor—Misrepresentation—Execution of deed without consideration.*

J. P. by his will provided as follows: "I give and devise to my brother D. P. the . . . on which he resides . . . to hold the same to the said D. P. for and during his natural life, and after the death of the said D. P. I give and devise the said . . . to H. P., second son of said D. P. to be held by the said H. P. for and during his natural life, and if the said H. P. shall leave offspring him surviving then I give and devise the same to such of his offspring as the said H. P. shall appoint and in case of no appointment being made by the said H. P. in his lifetime, then I devise the same equally to the children of the said H. P. in fee, and in case the said H. P. shall die without lawful offspring or during his father's lifetime, then I give and devise the same to . . ." D. P. and H. P., by conveyances and mortgages, dealt with the land as if they were the owners in fee. After several mortgages to one J. E., who was H. P.'s solicitor, were registered against it, and after D. P.'s death, J. E., having assured H. P. that his (J. E.'s) title to the land was perfectly good, and that H. P.'s children had no interest in it, persuaded H. P., as a matter of form, to execute the power of appointment in favour of L. S., one of his children, and to obtain from L. S. and her husband, without their knowing of the execution of the power of appointment, and on making the same representation and without consideration, a quit claim deed of all their interest in the land. In an action by L. S. and her husband, on discovering their interest, to have the quit claim deed delivered up to be cancelled, and to have it declared that the conveyances and mortgages made by D. P. and H. P. only bound their life estates, it was

*Held*, that only a life estate was given to H. P. and not an estate in fee tail. If "offspring" is read as "children," or construed as meaning "issue," the devise falls within the rule that where words of distribution, together with words which would carry an estate in fee, are attached to the gift to the issue, their ancestor takes for life only.

Here to the children or issue, in default of appointment, is given expressly an estate "in fee," and it is distributed to them "equally."

*Held*, also, that untrue representations were made which induced the execution of the power of appointment, and the transfer of the estate thereunder without consideration, and that the instruments subsequent to the deed of appointment did not affect the fee simple of the land, and that the operation of the mortgages should be limited to the life estate of H. P. in the land.

*Foster, Q.C., and Clark, for plaintiffs.*

*Moss, Q.C., for the defendants the executors.*

*Edminston, for Catharine E. Platt.*

Boyd, C.]

[June 5.]

## VERMILYEA V. CANNIFF.

*Patent—Assignment of territory—Defence of others manufacturing—Absence of fraud, warranty and misrepresentation in the bargain—Plaintiffs' rights.*

The plaintiffs, V. and P., being the patentees of a certain article, by memorandum in writing under seal, assigned all their interest in the patent to C. the defendant, for a certain district or territory in consideration of certain royalties and sums of money therein agreed to be paid by C.

In an action to recover the consideration, in which the evidence of C. went to show that he knew before the first year after the making of the contract had expired that others were manufacturing the patented article, but he did not complain or repudiate the transaction or refuse to pay or offer to reassign or require the alleged infringers to desist, or call upon the patentees to vindicate their patent, and that he had a profitable user of the invention to a substantial extent,

*Held*, that in the absence of fraud or warranty, or representations which induced the bargain, and were falsified in the result, such a contract is simply for the purchase of an interest in an existing patent. No assumption arises, and no implication is to be made that the patent is indefeasible: *Smith v. Neale*, 2 C. B. N. S. 89, and *Hall v. Conder*, commented on. *Hayne v. Maltby*, 3 T. R. 438, and *Saxton v. Dodge*, 37 Barb. (N.Y.) 84, distinguished. The plaintiffs were, therefore, entitled to judgment.

*Clute and Williams, for plaintiffs.*

*Cassels, Q.C., and Burdett, for defendant.*



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Boyd, C.]

[June 11.]

**WORTS V. WORTS.**

*Will—Power to make advances—Discretion—Board of executors and trustees—Binding majority.*

J. G. W., by his will, provided for the payment of annuities out of his estate for a period of ten years after his death, and then proceeded as follows:—"The residue of the income arising from my said estate to increase and accumulate for the said period of ten years. . . . I empower my trustees to make such advances from time to time to . . . as they (my trustees) in their discretion may deem advisable out of the principal or income of the share of such . . . ;"and by a codicil further provided "that the power to make advances in the eleventh clause of my will shall be limited to income only, and there shall be no power to make any such advance out of the principal."

*Held*, that the trustees had power to make advances without ascertaining the reason therefor, and that such advances were restricted to the accumulated income of the estate, but that each year's advances were not restricted to the accumulated surplus income of that year.

The will also declared "that any act done . . . by a majority of my trustees shall be deemed . . . the act . . . of all my trustees . . . and shall be binding upon all of them, and upon all persons claiming under this my will . . . and that my said trustees shall form a board, of whom W. H. B. shall be chairman . . . and each of my said trustees shall have one vote, with the exception of W. H. B., who shall have two votes, one equal with the other trustees . . . and another, or casting vote, whenever, by his first vote, the votes . . . are equal in number."

*Held*, that a majority of the whole board should bind the minority, and all persons claiming under the will.

*Lash*, Q.C., for the plaintiffs, the executors and trustees.

*Robinson*, Q.C., *Moss*, Q.C., and *Bain*, Q.C., for the beneficiaries.

*J. K. Kerr*, Q.C., and *Davidson*, for the infants.

Proudfoot, J.]

[June 16.]

**PARTLO V. TODD.**

*Trade Mark and Design Act of 1879—Action to restrain infringement of registered trade mark—Prior user—Definition of trade mark.*

In an action to restrain the infringement of a trade mark registered under the Trade Mark and Design Act of 1879,

*Held*, following *McCall v. Theal*, 28 Gr. 48, that prior user can be given in evidence to invalidate the trade mark.

*Held*, also, that the words "gold leaf," used in the plaintiff's trade mark distinguished the flour made by the plaintiff from that made by any other person, and as such was a proper subject of a trade mark within the language of section 8 of the Act.

*Held*, also, on the evidence that "Gold Leaf" was a common brand for patent flour in use before the registration of the plaintiff's trade mark, and that the plaintiff had not the right to endeavour to attribute to that which he might manufacture a name which had been for years before a well-known and current name by which that article was defined, and that there must be judgment for the defendant with costs.

*Cassels*, Q.C., and *Jackson*, for the plaintiff.

*Moss*, Q.C., and *G. W. H. Ball*, for the defendants.

[June 16.]

**MILLETTE V. SABOURIN.**

*Deed subject to condition of maintenance—Place of maintenance—Refusal of covenantee to leave premises conveyed—Broken condition—Forfeiture.*

H. S., by deed dated November 4th, 1863, granted his farm and some chattels to his son T. S. in consideration of \$300, subject to be defeated and rendered null and void upon the nonperformance of the said party of the second part of the following condition or any part thereof, viz.:—The said party of the second part covenants to feed, clothe, support and maintain the said party of the first part . . . during the term of his natural life. . . . T. S., having fulfilled the condition during his lifetime, died on October 5th, 1885, leaving a widow and one child. The widow removed from the farm, but offered to take H. S. with her to her father's house and have him provided for there, or to allow him to go to her brother's house in the

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same way, both of which offers were declined; and as no maintenance was provided for him by her at the farm he treated the condition as broken, and brought an action of ejectment and recovered judgment, and conveyed the farm away by deed, and the defendant became the owner by subsequent conveyance.

In an action of ejectment by the infant daughter of T. S., claiming under the deed to her father against the defendant, it was

*Held* (affirming the judgment of ARMOUR, J., PROUDFOOT, J., dissenting), that the grantor was not bound to accept the offers made, and that the conditions of the deed were broken and the land forfeited.

*Per* ARMOUR, J., at the trial.—The deed must be construed as being made upon condition, and as being defeated and rendered void by the nonperformance of the covenant, the effect of the covenant is that H. S. was to be maintained wherever he might choose to live, but he was not bound to go to any place the covenantor or his representatives might require him to go, and he was justified in refusing to accept the offers made.

*Per* BOYD, C.—The parent who for value purchases the right to support from his son has, if the written instrument is silent on the point, the first and controlling choice as to the place of abode. If the father's wishes are reasonable, having regard to his age and station in life, the court ought to respect these in preference to the counter propositions of those who are to supply the maintenance. There was here no caprice, no unwarrantable obstinacy in the father's resolve to cling to the homestead, such as should induce the court to disregard the general rule. The result is that the conditions of the deed were broken and the land forfeited.

*Per* PROUDFOOT, J.—The life interest of H. S. was not reserved out of the land; it rested solely on the condition with probably an equitable charge on the land. The condition is to maintain without specification of place; it imposes no personal obligation on the grantee, it may be fulfilled by any one having an interest in the property, and may be performed wherever the grantee or his representative might reasonably offer.

*Per* FERGUSON, J.—It was a condition annexed to the estate granted, the proper effect of which was that if broken the title would go to the grantor

or those claiming from him the reversion in the lands. The grantor was not bound to accept the offer that was made and there was a breach of the condition, the effect of which was to revert the estate.

*Shepley*, for the plaintiff.

*Moss, Q.C.*, for the defendant.

Ferguson, J.]

[June 29.

KENNEDY ET AL. V. THE CORPORATION  
OF THE CITY OF TORONTO ET AL.

*Patent subject to condition—Trust—Crown's rights—  
Private Act—Provincial Legislature—Ordinance  
lands—Intra vires—Interpretations.*

Certain ordnance lands vested in the Crown were in 1858 patented to the Corporation of the city of Toronto with the following clause in the patent "Provided always, and this grant is subject to the following conditions, viz: that (the land) . . . shall be dedicated by the said (corporation), and by them maintained for the purposes of a public park, for the use, benefit and recreation of the inhabitants of the said city of Toronto for all time to come . . ." The Corporation of Toronto in 1876 obtained from the Ontario Legislature an Act empowering them to lease, sell, or otherwise dispose of "the said land, and one of their committees transferred it to another to use as a cattle market, receiving a yearly rent therefor, which they applied to a park fund as provided by the Act giving the power to sell, etc."

In an action by a ratepayer to prevent the land being used as a cattle market, and more money being spent on it for that purpose, in which it was contended that the land was granted upon a condition under which the Crown might retake it, and that the Act of the Provincial Legislature was so *ultra vires* in dealing with it, it was

*Held*, on demurrer that the words in the patent "Provided always, and this grant is subject to the following conditions," did not create a condition annexed to the estate granted, but a trust was created the same as if the words used had been "upon the following trust," and that by the grant the grantors parted with all their estate and interest; that the matter came within sub-sec. 13 of sec. 92, B. N. A. Act, "Property and civil rights in the Province" and the Provincial Legislature was the proper one to legislate on the subject, and the Act was not *ultra vires*.

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*Held*, also, that the words "otherwise dispose of," when read with the rest of the Act, covered the mode of using the property adopted, viz., as a cattle market, and the demurrer was allowed with costs.

*C. Robinson*, Q.C., and *McWilliams*, for the demurrer.

*McCarthy*, Q.C., and *Maclaren*, contra.

*Johnson*, for the Attorney-General of Ontario.

### COMMON PLEAS DIVISION.

Divisional Court.]

[June, 1886.]

**TOMLINSON V. MORRIS.**

*Sale of goods—Warranty—Written notice—Waiver.*

By a written agreement the defendant sold a threshing machine to the plaintiff at a named price, the right of possession to be in the plaintiff until default, but until payment the right of property to be in the defendants, with a warranty by the defendants that, with good management, the machine would do good work, and was superior to any other machine made in Canada in its adaptation for separating and saving grain from straw with less waste, etc.; and that if, upon starting the machine, the plaintiff should intelligently follow the printed hints, rules and directions of the managers, and, if so doing, were unable to operate it well, written notice stating wherein it failed to satisfy the warranty was to be given by him to the defendants, and a reasonable time allowed to get to it and remedy the defect; unless of such a nature that the defendants could advise by letter; and if the defendants were not able to make it operate well, etc., and the fault was in the machine, they were to take it back and refund the payments made, or remedy the defective part. No printed hints, etc., were given. The defendants had, on the plaintiff's complaint, attended and made alterations in the machine, after which the plaintiff used the machine, but subsequently sent it back to the defendants, because, he said, it did not comply with the warranty, but, as defendants understood, to be repaired. No written notice, as required by the warranty, was given.

*Held*, that in the absence of the printed

hints, etc., the parties must be deemed to have dispensed therewith; that to avail himself of the warranty the plaintiff should have given the written notice; and that the attendance to make the alterations was not, under the circumstances, a waiver of such notice; but, in any event, was a question for the jury.

*Hardy*, Q.C., for the plaintiff.

*Robertson*, Q.C., for the defendant.

### CORPORATION OF ST. VINCENT V. GREENFIELD.

*By-law to open road allowance—Necessity to show boundaries—Statute labour—Evidence of performance of.*

A by-law to establish a road allowance must, on its face, show the boundaries of the road, or refer to some document wherein they are defined, and the intention of the framers of the by-law cannot be ascertained by the aid of extrinsic evidence.

The by-law in this case to establish a road on the blind line between two concessions in the defendant's township, was, by reason of such omission, held defective.

*Held*, also, that on the evidence set out in the case, the road in question had not become a public highway by reason of statute labour having been performed thereon.

*Cressor*, Q.C., for the plaintiffs.

*A. Frost*, for the defendant.

### COSTELLO V. HUNTER.

*Husband and wife—Breach of promise of marriage—Corroboratory evidence—Statute of limitations.*

In an action for breach of promise of marriage, the plaintiff stated that the defendant promised to marry her in the fall of 1873, but that when that time arrived he excused his doing so because he said he had not his house built, and that he could not marry until he had a suitable house. The plaintiff told him she was willing to live in a shanty, and he then said he would not marry until he could keep plaintiff. The house was built in the summer of 1878. No definite promise was proved after the fall of 1873, but the plaintiff and defendant kept up friendly relations until 1884, when the defendant married another

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woman, and this action was brought. The defendant denied the promise. In his examination before the trial he admitted visiting the plaintiff, and of talking to her of marriage, but he said it was not of their marriage but that of other persons; that when he visited her she was alone and he kissed her. In corroboration of the plaintiff's evidence a witness stated that in the fall of 1882 he had a conversation with plaintiff who, referring to some girls who visited his house, said he was not going to marry those who wanted his house, but the girl who wanted him; and on witness saying he supposed this was the plaintiff, the defendant answered "yes." The witness stated that in the next spring or the one following after that, he had a further conversation with defendant, when defendant said he was either going to rent or sell his house or get married, when witness said that he supposed plaintiff and defendant would soon make the match, to which the defendant made no reply.

*Held*, that the action was not maintainable.

*Per CAMERON, C.J.*—The promise stated by the plaintiff was sufficiently corroborated, but the action was barred by the statute of limitations.

*Per GALT, J.*—Without expressing any dissent from the opinion of CAMERON, C.J., on the statute of limitations, the plaintiff's evidence was not sufficiently corroborated.

*Per ROSE, J.*—The action was barred by the statute of limitations.

*Tetzl*, for the plaintiff.

*Falconbridge, Q.C.*, and *Gwyn*, for the defendant.

#### ARDAGH v. THE CORPORATION OF THE CITY OF TORONTO.

*Contract—Written certificates—Necessity for—Final certificate.*

The plaintiff entered into a contract with the defendants to construct a cedar block roadway, etc., according to plans and specifications, and to the directions and satisfaction of the city engineer, etc. Payments to be made monthly at the rates mentioned in the tender during the progress of the work, upon the engineer's certificate and the chairman of the committee, according to the provisions of

the By-law No. 1107, relative to corporation contracts, which were incorporated with the contract. No money was to become due or payable on the contract until such certificate was granted, and a drawback of 15 per cent. of the amount appearing by any contract to be due was to be retained by the corporation for six months from the date of the final certificate showing the satisfactory completion of the work. The provisions of the by-law were that no contractor, etc., should be paid the compensation allowed him (unless otherwise provided for by the contract) or any part thereof, unless at the time of paying the same he should present to the Treasurer a certificate from the engineer, etc., stating that he had examined, measured, and computed the work, and that the same was completed, or that the payment demanded was due on such work; and also stating what the work was on which such money was due. Also that every account before being paid should be certified by the city engineer, and by the committee under whose authority the work was done; and that the treasurer should not pay such accounts unless furnished with the two certificates. By the specifications the engineer was to be the sole judge of the quantity and quality of the work done, and his decision was to be final and conclusive as against the contractor; that monthly payments up to 85 per cent. of the work done should be made in the first week of the following month on the measurement of the engineer, such certificates to be binding only as to progress, and in no way to affect the final certificate, which should only be given on the whole work being completed and measured up, and at the expiration of six months when a certificate for the balance should be issued by the engineer. In an action to recover an alleged balance due under the contract,

*Held*, that to entitle the plaintiff to recover the amount due under the contract on the completion of the work, he must produce a written certificate thereof, and that an oral certificate was not sufficient: and the evidence set out in the case showed that no final certificate, as required, had been issued.

*Lount, Q.C.*, and *Pearson*, for the plaintiff.

*Robertson, Q.C.*, and *J. B. Clarke*, for the defendants.

Com. Pleas.]

NOTES OF CANADIAN CASES.

[Com. Pleas.]

## PALMBY V. MCCLEARY.

*Seduction—Evidence—Excessive damages.*

In an action for seduction the only evidence was that of the plaintiff, the father of the seduced girl, and the defendant. The plaintiff stated that the defendant admitted he had seduced the girl, and asked what the case could be settled for, when plaintiff said \$500. The defendant said that he was not the father of the child, and had not made any such admission, but admitted having asked what the case could be settled for, but did so only out of curiosity. The jury found for the plaintiff with \$750 damages.

*Held*, that there was sufficient evidence to go to the jury; and that the damages under the circumstances were not excessive.

*Bartram*, of London, for the plaintiff.

*Meredith*, Q.C., contra.

## SCOUGALL V. STAPLETON.

*Malicious prosecution—Evidence—Taking legal advice, stating whole facts—Magistrate consulting County Attorney—Admissibility of evidence—Judge's charge—Depositions.*

In an action for malicious prosecution it appeared that plaintiff's father sold a buggy to B. for \$115, to be made in two payments of \$58 and \$57 respectively, and until paid the title and right of property were to remain in the vendor. Before the purchase money was paid B. sold the buggy to defendant, a livery stable keeper. The plaintiff's father on hearing of this, directed the plaintiff to go and take it from defendant, which plaintiff did, informing those at defendant's place that plaintiff could be seen at a hotel he named. The defendant on his return went and saw the plaintiff, when the plaintiff told him he was acting under instructions from his father, who claimed to be the owner of the buggy, but notwithstanding defendant caused plaintiff to be arrested for larceny, and he was committed for trial, and was subsequently tried and acquitted. The defendant set up that before causing the arrest he consulted a lawyer, but the jury found that plaintiff did not give a full and true account of the case. The jury found for the plaintiff.

*Held*, on the evidence, the verdict would not be interfered with.

Evidence was offered that the magistrate, against whom there was no charge, had before acting consulted the county attorney, which was rejected.

*Held*, that the rejection was proper.

An objection was taken to the judge's charge as being adverse: but *held* not tenable.

At the close of the defence the plaintiff's counsel, without objection, put in the defendant's depositions before trial. The plaintiff's counsel in addressing the jury read a portion thereof; and the learned judge in his charge read other portions.

*Held*, there would be no objection to the learned judge reading such other portions, and they were properly in evidence.

*Nesbitt*, for the plaintiff.

*G. T. Blackstock*, contra.

## VANMERE V. FAREWELL.

*Surgeon—Malpractice—Evidence—Interfering with jury—Rejection of evidence.*

Action against a medical man for malpractice, the alleged malpractice consisting in applying what was called the primary bandage; and if this was good surgery, that it was applied too tightly and allowed to remain too long, whereby the arm sloughed, etc. The jury found for the defendant.

*Held*, on the evidence the verdict could not be interfered with.

A medical man called by the defendant stated that from the evidence given by the defendant and the evidence throughout the case, he could not say that the defendant's treatment was bad surgery. The plaintiff proposed to call evidence in reply to show that from what defendant stated at the trial the treatment was bad surgery.

*Held*, inadmissible.

The defendant, in conversation with one of the jury panel, but not one of the jury called to try the case, said he hoped the jury would give defendant the benefit of any doubt.

*Held*, not sufficient to justify the court in interfering with the verdict.

*Robertson*, Q.C., for the plaintiff.

*Osler*, Q.C., and *Tetzels*, contra.

[Com. Pleas.]

NOTES OF CANADIAN CASES.

[Com. Pleas.]

## POLSON V. DEGEER.

*Property passing—Engine and boiler—Illegal detention.*

An engine, boiler and other machinery were shipped to the defendant E. under a written order to ship same to his address as per price agreed on—\$875—\$225 to be allowed for E.'s portable engine and boiler, and \$635 to be paid on shipment; but if not settled for in cash or notes within twenty days the whole amount to become due. The order not to be countermanded and until payment the machinery to be at E.'s risk, which he was to insure, and on demand assign policy to the plaintiff, and the title to machinery was not to pass out of plaintiff, E. agreeing not to sell or remove same without the plaintiff's consent in writing. On default of payment he could enter and take machinery, and E. agreed to deliver same to plaintiff in like good order and condition as received—save ordinary wear and tear—and to pay expenses of removal. Any notes or other security given by E. for his indebtedness to be collateral thereto. The machinery was put up in a mill on premises leased by defendant D. to E.'s wife for one year from 11th March, 1881, and which premises D. agreed to sell to E. E.'s wife died on 23rd October, 1883, and by her will appointed E., her executor, giving him power to sell or dispose of any property to which testatrix was or might be entitled. E., by deed dated 27th April, 1885, remised and released to D. all the right, title and interest in the premises, as well of himself as also as executor, together with the mill built thereon, with the boiler and engine and all fixed and movable machinery; and on the same day D. leased the said premises, mill and machinery to E. for one year. After the execution of this lease D. mortgaged the land, mill and machinery to the defendants, the F. Loan Society. The defendant E. never paid any cash, but gave his promissory note at three months which was renewed from time to time, but ultimately, E. having failed to pay same, the plaintiff demanded the machinery when D. notified plaintiff not to remove same, as also did the society. In an action against E., D. and the F. Society,

*Held*, that the effect of the transaction was that the property in the machinery was in the

plaintiff, and that he was entitled thereto; and that there was an illegal detention by defendants amounting to a conversion; and that unless the defendants allowed the plaintiff to remove the machinery the plaintiff was to recover the \$650 with interest.

*Reeve*, Q.C., for the motion.

*Echlin* and *Hands*, contra.

## ROAN V. KRONSTEIN.

*Lease for life—Statute of limitations.*

In ejectment the following agreement was proved: "It is hereby agreed between R. and Mrs. H. that the line as surveyed between the lots of the above parties on Cherry Street by Mr. B. is correct; but that the said Mrs. H. be permitted to occupy her house during her life and not be compelled to remove the same, notwithstanding a portion of it is on the land of said R.; but that after the death of the said Mrs. H. said R. may claim the whole of his said lot; and that in the meantime said R. shall occupy his said lot up to the said line in rear of the said house."

*Held*, that the agreement must be construed as a demise, or lease to Mrs. H. for life of that portion of the lot 12 covered by the house, and not merely a license to occupy same, so that the right of entry thereto of the plaintiff, who claimed under R., did not accrue until Mrs. H.'s death, and therefore plaintiff having brought his action within ten years of Mrs. H.'s death was not barred by the statute of limitations.

*Carscallen*, for the plaintiff.

*Robertson*, Q.C., for the defendants.

## REGINA V. ANDREWS.

*Criminal law—Evidence, admissibility of—Corroborative evidence.*

The prisoner was indicted for unlawfully using an instrument on one J. L., with intent to procure her miscarriage. J. L. was called for the prosecution to prove the charge, and in cross-examination she stated that she had not told H. A., H. R. and M. T. that before the prisoner had operated on her she had been operated on for the purpose of procuring a miscarriage by Dr. B. H. A., H. R. and M.

## Com. Pleas.]

## NOTES OF CANADIAN CASES.

## [Com. Pleas

T. were called for the defence, and swore that J. L. had so stated to them. Dr. B. was then called by the Crown, and he swore that he had not operated on J. L. as stated.

*Held*, that the evidence of Dr. B. was admissible.

*Held*, also, that the omission of the learned judge at the trial to tell the jury that the evidence of an accomplice ought to be corroborated does not entitle the prisoner to have the conviction reversed; and in this case there was no necessity for the caution, as there was abundance of corroborative evidence.

*Osler*, Q.C., for the prisoner.

*McMahon*, Q.C., for the Crown.

Wilson, C.J.]

ADAMS V. CORPORATION OF THE CITY OF  
TORONTO.

*Municipal corporations—Necessarily raising sidewalk—Premises injuriously affected thereby—Arbitration—Compensation—Action.*

Where the corporation of the city of Toronto, in the exercise of its corporate powers, necessarily raised the sidewalk in front of the plaintiff's premises, whereby, as was alleged, the plaintiff's premises were injuriously affected.

*Held*, on demurrer, that this was not the subject of an action, but for compensation under the arbitration clauses of the Consolidated Municipal Act, 1883.

*C. Durand*, for the plaintiff.

*W. A. Foster*, for the defendants

Wilson, C.J.]

IN RE O'MEARA AND CORPORATION OF  
OTTAWA.

*Municipal Act, 1883, s. 503, 497, ss. 4, 6—By-law—Sale of fresh meat less than by quarter carcass—Restrictions, etc.—Reasonable accommodation.*

By section 503 of the Municipal Act, 1883, the council may, subject to the restrictions and exceptions contained in the six next preceding sections, pass by-laws as provided by the following sub-sections:—(1) For establishing markets; (2) for regulating markets, etc.;

(3) for preventing or regulating the sale by retail in the public streets or vacant lots, etc., of any meat, etc.; (4) for preventing or regulating the buying and selling of articles or animals exposed for sale or marketed; (5) for regulating the place and manner of selling and weighing grain, meat, etc., and all other articles exposed for sale and the fees to be paid therefor, etc.; (6) for granting annually, or oftener, licenses for the sale of fresh meat in quantities less than by the quarter carcass, and for regulating such sale, and fixing and regulating the places where such sale shall be allowed, and for imposing a license fee . . . and for preventing the sale of fresh meat in quantities less than by the quarter carcass, unless by a person holding a valid license, and in a place authorized by the council, etc. The restrictions and exceptions, so far as applicable, are those contained in sub-secs. 4 and 6 of sec. 497. Sub-sec. 4 applies to articles for sale brought into the municipality after 10 a.m., and upon which market fees are not to be imposed unless they are offered for sale on the market; and sub-sec. 6 applied to those persons who go to the market place before 9 a.m. between 1st April and 1st November, and 10 a.m. between 1st November and 1st April, with any article they may sell in the market place: and with regard to such persons that after these respective hours they shall not be compelled to remain on the market place, but may proceed to sell elsewhere on paying the market fees.

*Held*, that a by-law passed under sub-sec. 6, need not be made subject to such restrictions, etc., for the proper construction of the sections is that sec. 503 is made subject to such restrictions, so far as properly applicable, and that sub-sec. 6 is in the nature of an exception from these general restrictions, etc.

*Semble*, that the court might quash a by-law of this description when plainly insufficient accommodation is furnished, unless in the alternative the municipality should provide reasonably fit and full accommodation; but, as a rule, the municipality is the judge of its own business and affairs, and it is probably an extreme case in which the court would interfere.

*Clement*, for the plaintiff.

*MacLennan*, Q.C., for the defendant.

Com. Pleas.]

NOTES OF CANADIAN CASES.

[Com. Pleas.

Cameron, C.J.]

## HODGSON V. BOSANQUET.

*Municipal corporation—Arbitration and compensation—Reference to county judge.*

A portion of a drain constructed by a township corporation having been dug on the plaintiff's land, an arbitration was had under the Municipal Act to ascertain the compensation the plaintiff was entitled to by reason of the damage alleged to have been sustained by him: (1) for land taken for the drain; (2) for the throwing of earth on the land on the side of the drain; (3) for the building of bridges to cross the drain; and (4) the backing of water into the plaintiff's cellar. The arbitrators found that the plaintiff had not sustained any damage, and they made an award against him, imposing on him a large portion of the costs.

*Held*, by CAMERON, C.J., that the evidence sustained all the grounds of damage except the last, as to which the evidence was not very satisfactory. The learned judge was therefore of opinion that he could not ascertain the compensation himself, and so set aside the award, and intimated that unless the parties could agree on new arbitrators, he was disposed to direct a reference to the county judge.

*Aylesworth*, for the plaintiff.

*Lash*, Q.C., for the defendant.

Galt, J.]

## REGINA V. HALPIN.

## REGINA V. DALY.

*Canada Temperance Act, 1878—Day of adoption of Act—Accused not bound to criminate himself.*

On an application to quash a conviction under the Canada Temperance Act of 1878,

*Held*, that the adoption of the Act is on the day of polling.

*Held*, also, that under sec. 123 of the said Act a person accused is not obliged to criminate himself.

*Robinson*, Q.C., and *G. T. Blackstock*, for the applicants.

*Edwards* (of Peterborough), contra.

Proudfoot, J.]

## YOUNG V. PURVIS.

*Will—Disposition of real and personal estate—Appointment of executors—Description of land—Maintenance—Charge on land—Infant executor—Devastavit.*

A testator by his will directed his executors "hereinafter named" to pay his debts and funeral expenses, and then devised the residue as follows:—To his son David, lot 16, concession 7, N. H., real and personal property; the said David to pay to each of his daughters \$500, namely: Janet, Mary and Agnes, in two years after his death; Margaret and Ellen at twenty-five, and Christina to remain on the farm, the said sum to be given her when she became of age. No executors were named. Parol evidence was admitted to show that the land mentioned was in the township of Morris; that "N. H." meant north half, and that it was the only land owned by testator. Parol evidence was also admitted to show that Christina, though spoken of as a minor, was twenty-three years old when the will was made, and that she was of delicate constitution and of weak mind.

*Held*, that there was an effectual disposition of the real and personal estate; that to a disposition of personal estate executors need not be expressly named, but may appear by implication; and that David would be executor according to the tenor; that, as to the land, the parol evidence, which was properly admissible, cleared up any ambiguity as to the description; and that the parol evidence showed that as regards the provision in favour of Christina she must be treated as an adult; and that the provision for her would include maintenance.

An infant, whether executor or executor *de son tort*, is not liable for a devastavit. Legacies directed to be paid out of a mixed residue are a charge on land.

*Garrow*, Q.C., for the plaintiff.

*M. G. Cameron*, for the defendant Purvis.

*Malone*, for the Toronto General Trusts Company.



Com. Pleas.]

NOTES OF CANADIAN CASES.

[Com. Pleas.]

Proudfoot, J.]

THE LONDON INSURANCE CO. V. LONDON.

*Assessment—Income—Mutual Insurance Co.—  
Appeal to county judge—Finding.*

The defendants assessed the plaintiffs for \$590.52 on an alleged income of \$26,000, being the balance of money received by the plaintiffs, a Mutual Insurance Company, for premiums, etc., after payment of the current year's losses and expenses. The plaintiffs contended that there was no income, for that the said balance, under the statutes relating to the plaintiffs, was to be applied in reduction of the assessments on the premium notes for the ensuing year, and they appealed to the Court of Revision, which confirmed the assessment. The plaintiffs then appealed to the county judge, who dismissed the appeal. The plaintiffs then paid the amount under protest, and brought this action to recover it back.

*Held*, that the decision of the county judge was final, and this action was therefore not maintainable.

*E. R. Cameron*, for the plaintiffs.

*W. R. Meredith*, Q.C., and *T. G. Meredith*, for the defendants.

## CRAWFORD V. BUGG.

*Landlord and tenant—Covenants not to assign or sublet, and for quiet enjoyment, and to repair, and to repair according to notice—Assigns named—Reasonable wear and tear, etc.—Covenant to use premises in tenantable manner—Action of waste—R. S. O., cap. 107, sec. 9.*

On 19th May, 1870, E. made a lease of certain household premises to P. for twenty-one years. On 30th June, 1871, P., with E.'s assent, assigned to J. B. On 10th April, 1877, E., who was merely a bare trustee for plaintiff, assigned the reversion to her. On 29th December, 1882, J. B., without plaintiff's knowledge or assent, assigned to C. B., who thereafter was in possession of the property, receiving the rent from sub-tenants and paying the rent under the principal lease to plaintiff. The plaintiff had also received the rents prior to E.'s assignment to her. The lease was made under seal, and was in the ordinary printed form, and purported to be under the

Short Form Act. The statutory covenants were prefaced by the words "and the said lessee for himself, his heirs, executors, administrators and assigns, covenants with the said lessor, his heirs, executors, administrators and assigns, in manner and form following, that is to say." Then followed the ordinary statutory covenants, except that after the covenant "to repair" were the words, "reasonable wear and tear and damage by fire and tempest excepted;" and after the covenant "not to assign or sub-let without leave," the additional covenant, "and not to carry on any business that shall be deemed a nuisance." The covenant not to assign was (except as to the additional words) in the language used in covenant seven, column two, of the Short Form of Leases Act.

*Held*, that the covenant not to assign or sublet, etc., did not include assigns, as they could not be held to be named; and the prefatory words to the covenant would have no contrary effect, and therefore J. B.'s assignment to C. B. was no breach thereof; and this was equally so as to sub-letting by using the premises as a tenement house; and also from the fact of the user having been open and notorious, both by P. and J. B., for some thirteen years, a license to do so must be presumed.

*Quære*, whether such covenant ran with the land, the authorities on the point being conflicting; but the county judge, to whom the case had been referred, having found that it did so run, a judge sitting in single court refused to interfere.

*Held*, also, that the covenant to repair ran with the land; that J. B.'s liability as assignee of the term ceased on his assignment to C. B., and he would only be liable for the breaches, if any, which occurred prior thereto; and the covenant must be read as subject to the words, "reasonable wear and tear," etc.

*Held*, also, that there could be no liability on the part of the defendants or executors of J. B., for breach of an implied covenant by themselves and J. B. to use the premises in a tenant-like manner, for there being a lease under seal, with express covenants, no such implied covenant would arise.

*Held*, also, that an action of waste would lie notwithstanding the express covenants to repair, but there must be what would constitute

Com. Pleas.]

NOTES OF CANADIAN CASES.

[Com. Pleas.

waste—a mere breach of covenant, not amounting to waste, not being sufficient, but to maintain such action the plaintiff must have a vested interest in the reversion at the time waste is committed, so that the claim, if any, must be for waste committed after she acquired the reversion, and up to J. B.'s assignment; but there would be no liability here, for, as to J. B., it appeared his assignment was made more than a year prior to his decease; and the R. S. O. cap. 107, sec. 9, only applies to breaches committed by testator within six months prior to his decease; and that it was not necessary for the defendant to set this up as a defence, the onus being on the plaintiff to show that she came within the statute; and as to the executors, it appeared that they had no interest in the term, nor had they ever intermeddled with the property.

*Held*, also, that there was no breach of the covenant to repair according to notice, for here the notice was given to J. B. after he had parted with his interest in the term.

*Held*, also, that the evidence failed to disclose the date when the breaches, if any, occurred, and therefore, whether they were prior or subsequent to the assignment to J. B.; at all events they were such as came within the terms "reasonable wear and tear."

S. Richards, Q.C., and Nelson, for the plaintiff.  
W. Macdonald, for the defendants.

#### IN RE SMITH AND CORPORATION OF PLYMPTON.

*Arbitration and award—Consolidated Municipal Act, 1883—Arbitration Clauses—By-law appointing arbitrator—Arbitrator refusing to act—Award by other two—Revoking arbitrators' authority—Appointment of third arbitrator by judge—Meeting of arbitrators within twenty days—Oath.*

A township by-law, after reciting that there was a difficulty with S. "from alleged damage from water flowing from local drains known as the H. and S. drains," enacted that F. was appointed arbitrator for the township. The notice given by the reeve to S. was that "the corporation had elected that the claims made by you for damages to the east half of lot 11," etc., "on account of the construction of the drain from P. to the S. drain, or consequent

thereon, shall be referred to arbitration." Before the parties had been heard on the merits, the plaintiff's arbitrator withdrew from the arbitration and refused to act; but the other two arbitrators, notwithstanding, proceeded with the reference and made an award.

*Held*, that the reference was wholly informal, the subject thereof not being properly defined; and though the notice given by the reeve to do so, would make the matter sufficiently clear, it did not affect S., for he never entered upon the arbitration, but repudiated the arbitrators authority at the first meeting of which he had notice; but, even if the reference was sufficient, the award was bad by reason of the two arbitrators proceeding alone, the Municipal Act requiring (in the absence of a special agreement to refer) that there shall be three arbitrators continuing to act from the time of their appointment until the award has been made, and enabling the County Court Judge to appoint another arbitrator in the place of one refusing or neglecting to act.

*Quære*, whether it is in the power of either party to the reference to revoke the authority of the arbitrators.

*Semble*, that the provision in the statute that the arbitrators must hold their first meeting within twenty days from the appointment of the last arbitrator is not imperative, but directory merely; and therefore an omission to hold such meeting within such time would not invalidate an award made within the month, as required by the Act.

*Semble*, also, that the County Judge may appoint the third arbitrator *ex parte*; although this is not desirable; and that the power to appoint does not depend on the disagreement of the two arbitrators, but on their failure to agree within the seven days limited therefore.

It was objected that the arbitrators had not taken oath required by the statute; but,

*Semble*, this objection was not tenable, as the oath they took was substantially the same as that required.

Aylesworth, for the plaintiff.

Lash, Q.C., for the defendants.

## CORRESPONDENCE.

## CORRESPONDENCE.

## AN IRISH REPUBLIC.

To the Editor of the LAW JOURNAL :

SIR,—The establishment of an Irish republic is not at present within the range of " practical politics." At the same time there is no doubt that, in the minds of some discontented Irishmen, such a prospect is looked forward to as " a consummation devoutly to be wished." And certain Irishmen, who are not discontented, are tempted to sympathize with such aspirations, without perhaps sufficiently reflecting on the possible effect they might have, if carried out, on their own individual fortunes.

Few Irishmen could be found in Canada who have any reasonable ground for complaint as subjects of Her Majesty in this Dominion. They are subject to the same laws, and have the same rights and privileges as are possessed by their fellow-citizens of other races. But though Irishmen generally are contented with their lot here, some of them are sometimes prone to think that their native land might, in some way or other, be benefited if it could be delivered from its present connection with Great Britain. They assume that, in some way which has never yet been clearly defined, the laws enacted by the British Parliament are detrimental to the Irish, and they assume that if the government of Ireland were committed to the Irish themselves, legislation would take place more favourable to the interests of their native country.

I am inclined to think Irishmen in Canada, and other parts of the British Empire, who sympathize with these notions, assume that such an event as the establishment of an Irish republic, while conferring a benefit on their native land, would in nowise affect them individually, and that their own status as British subjects would, notwithstanding, remain as it is at present.

Perhaps it is as well that Irishmen, who are disposed to support such opinions, should be reminded that the consequences of the establishment of an Irish republic may possibly be a great deal farther-reaching in its effects than it is at present supposed.

A case recently decided by the English Court of Appeal appears, incidentally, to throw a flood of light on the legal consequences which would flow from this momentous change in the condition of Ireland. The case I refer to is the *Stepney Election Case*, which is reported in the last number of

the English Law Reports, 17 Q. B. D. 54. In that case the court had to determine whether certain Hanoverians, born in Hanover while William IV. was King, continued to be British subjects after Her Majesty's accession to the throne of Great Britain. William IV., it may be remembered, was both King of England and King of Hanover. On his death, owing to the operation of the Salic law, his heir to the throne of England, being a female, could not succeed to the throne of Hanover, the succession to which, therefore, devolved on his brother, who was his nearest male heir, and consequently the sovereign of Great Britain ceased to be the sovereign of Hanover. So long as the kingdoms of Great Britain and Hanover were under the same sovereign, all persons born in Hanover were British subjects. The question the Court of Appeal had to determine was, as I have said, whether persons born in Hanover while its sovereign was also king of England, remained British subjects when it passed to the dominion of another sovereign. The Court of Appeal unanimously determined that they did not, and that it was incumbent on them to be naturalized before they could be entitled to the privileges of British subjects. Their right to vote at parliamentary elections, without being first naturalized, was therefore denied.

If the English Court of Appeal has correctly laid down the law, and allegiance follows the sovereign and cannot be divested by the mere election of the subject, it follows that if an Irish republic were established to-morrow, all Irishmen born in Ireland, who are resident in England, Canada, or any other part of the British dominions, would *ipso facto* become aliens in Great Britain and its dependencies, and would be deprived of the rights and privileges of British subjects, and before they could acquire these again would have to take out letters of naturalization no matter how much they might prefer to continue British subjects. This would lead to curious results. A good many of our public men would be suddenly put out of public life. Messrs. Curran, Anglin, Costigan, Senators Smith and O'Donohoe, and all other Irish-born men, would cease to be qualified to sit as members of parliament; judges, and all other officials of Irish birth, would cease to be qualified to hold office. In fact, every public office held by an Irish-born person in the British dominions would become vacant. Archbishop Lynch and Dr. Potts, and all other Irish-born persons, ecclesiastical and lay, would become aliens, and would cease to be qualified to vote at all public elections.

Should a war arise between Great Britain and the Irish Republic, all Irishmen captured fighting against Ireland would be liable to be treated as traitors and shot.

Are Irishmen in Canada, who are tempted to advocate the separation of Ireland from Great Britain, prepared for any such result? I think they are not; and, on the contrary, I think I have shown that they have individually a strong personal interest in maintaining British connection.

Yours, etc.,

CIVIS.

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## DIARY FOR SEPTEMBER.

17. Fri.....First Parliament of U. C. met at Niagara, 1792.  
18. Sat.....Trinity term of Law Society ends. Quebec surrendered to the British 1759.  
19. Sun.....13th Sunday after Trinity.  
20. Mon.....Sir Walter Scott died, 1832.  
21. Tues.....14th Sunday after Trinity.  
22. Wed.....Michaelmas Day. W. H. Blake 1st Chan. 1849.  
Sir C. Poppys (afterwards Lord Cottenham) appointed Master of Rolls, 1834.

TORONTO, SEPTEMBER 15, 1886.

THE following notice has been promulgated by the Chancery Division by direction of the judges of the division, viz.: "After the present sitting of the Divisional Court of the Chancery Division, motions for new trials and to set aside verdicts in jury cases in the Chancery Division are to be made by notice of motion, which is to be given and set down according to the provisions of Rules 522 and 523, and unless for some special reason an order *nisi* will not be granted."

With the propriety of the practice which this notice lays down on its merits, we have nothing to say. We are, however, inclined to think that it would have been better if the regulation in question had emanated from the collective body of judges, who are empowered to make rules for the Supreme Court. Practitioners are unfortunately placed by it in this dilemma. Rule 308 expressly prescribes one method of practice, whereas this regulation of the judges of the Chancery Division has virtually abolished that practice and substituted another. The judges of the Chancery Division would no doubt uphold the validity of their own regulation, but the question the practitioner will have to face, is, Whether the Court of Appeal will also do so?

## COMMON CARRIERS IN ONTARIO.

WHEN the laws of England were introduced into Canada in 1792, the liability of a common carrier was simply that of an insurer of the goods entrusted to him. He was responsible for their loss or damage from any cause whatever, except the act of God or the king's enemies. How is it then, that in the absence of any statutory enactment extending the rights of carriers, our Reports show so many cases exonerating carriers from liability where the damage was caused by their negligence or by other causes not included in the above exception?

One's curiosity is further increased on finding a special provision inserted in the Railway Acts, preventing railway companies from relieving themselves of liability, by any notice, condition or declaration, if the damage arise from any negligence or omission of the company or its servants (Con. Ry. Act, 1879, sec. 25, subsec. 4).

This was already amply provided for by common law, and there was no intermediate change by statute.

The greater portion of the carrying trade in this Province is doubtless done by railways; but a very large portion is done by other carriers to whom the Railway Acts do not apply. The question, therefore, is not without practical importance, and I think that a carrier's right to contract himself out of liability for negligence will be found to be not so extensive as is generally supposed.

In order to arrive at a starting-point in an inquiry we have to go back all the way to the time when the law of England was introduced into Canada.

## COMMON CARRIERS IN ONTARIO.

The cases to which I shall subsequently refer show that shortly after 1792 carriers in England commenced a practice of qualifying their liabilities within certain limits, by posting up and advertising notices to the effect that they would not be responsible for goods above a certain value, unless the same was declared and an additional sum paid for the extra risk. This was only reasonable, for in those days, before railways were invented, the risks attending the carriage of goods in stage coaches, etc., were very much greater than they are now. The difference between such a qualification and a stipulation to protect the carrier from his own fraud or negligence is very manifest.

To entitle him to the benefit of such a notice it was always necessary to bring it home to the shipper's knowledge (*Kerr v. Willan*, 6 M. & S. 150); and when this was done the notice operated by way of contract (*Nicholson v. Willan*, 5 East 507).

As I have above remarked, even this liberty was not open to carriers when the English law was introduced here (*Leeson v. Holt*, 1 Stark, 186). But granting that carriers in this country had the same right to qualify their liabilities as their brethren in England had, let us see how matters proceeded there. The rapid increase of these notices, and the difficulties which they entailed upon both carriers and shippers led to the passing of the Carriers Act, 11 Geo. IV., and 1 W. IV., cap. 68. This Act did away with these notices almost entirely, but provided that nothing in the Act contained should be construed to affect any special contract between the parties for the conveyance of goods.

It soon became apparent that the Act gave undue advantage to the carriers, and that they made it an excuse for exempting themselves from just liabilities by means of protective conditions inserted in their contracts.

The climax appears to have been

reached in *Carr v. The Lancashire and Yorkshire Ry. Co.*, 7 Ex. 707, when an alteration of the law was recommended by the court, and this was answered by the passing of the Railway and Canal Traffic Act, 1854.

The change effected by this statute may be shortly stated to be that while it left the carriers free to make such contracts as they pleased (in writing and signed by the shipper), it reserved to the Courts the power to say whether any particular condition relied on by the carrier was just and reasonable.

Soon after this Act came into force the railway companies adopted the plan of offering alternative rates to shippers, so that on payment of the higher or parliamentary rate the companies accepted their full common law liabilities; but if a shipper desired it, they carried his goods at a lower rate, and imposed such conditions as they saw fit.

This was a fair and reasonable system, and is well illustrated in the case of *Brown v. Manchester*, L. R. 8 App. Cas. 703, where it was held that a contract exempting the defendants "from all liability for loss or damage by delay in transit, or from whatever other cause arising," was not unreasonable in the case of a shipper who had chosen to take advantage of the lower rate. But even under these circumstances Lord Fitzgerald doubted whether the carrier would have been protected from wilful misconduct. So far as I am aware, this system of alternative rates has never been adopted in this country.

Bearing in mind then the changes effected by legislation in England since 1830, let us see in what manner our Courts have dealt with this branch of the law.

In *O'Rorke v. Great Western Ry. Co.*, 23 U. C. R. 427, the plaintiff sent some cattle from Beachville by defendants'

## COMMON CARRIERS IN ONTARIO.

railway, signing a paper which declared "that he undertook all risk of loss, injury, or damage in conveyance and otherwise, whether arising from the negligence, default and misconduct, criminal or otherwise, on the part of the defendants or their servants." He was told by the station master that he would have to sign the conditions, which he did without taking time to read them. To an action for negligence in the carriage of the cattle, by which five of them were killed, the defendants pleaded these conditions, which the jury found the plaintiff had signed. It was held that he was bound by them, though he might not have read or understood the paper. It is clear that it could not have been so decided in England subsequently to the Railway and Canal Traffic Act, because there was no alternative rate and the condition was grossly unreasonable. And I think it will appear equally clearly that it could not have been so decided in England prior to the Carriers Act by reason of the authorities to which I shall refer below.

The decision is all the more remarkable when we look at the only two authorities cited in the judgment. The first of these was *Simons v. The G. W. R.*, 2 C. B. N. S. 620, decided in 1857. There the plaintiff had signed a contract, one of the conditions in which was that the company were not to be responsible for any loss or damage however caused. The plaintiff proved that his signature was obtained by the defendant's clerk, who told him the document was of no consequence but was a mere matter of form. The question left to the jury was whether or not the goods were delivered to and received by the defendants to be carried under a special contract, and the jury found for the plaintiff.

The judgment of the court was contained in the following words of Cockburn, C.J.:—"I see no ground for finding fault

with the verdict in this case. To hold the plaintiff bound by a contract foisted upon him under such circumstances would be to permit the defendants to take advantage of their own fraud." It was, therefore, wholly unnecessary to consider the terms of the alleged special contract. The second case referred to is *Stewart v. London & N.-W. Ry.*, 10 L. T. N. S. 302, and 3 H. & C. 135, and all that I need say as regards this is that it has been since distinctly overruled, see *Cohen v. S.-E. Ry.*, L. R. 2 Ex. D. 253. A condition equally objectionable to that pleaded in *O'Rorke v. The G. W. Ry.*, was upheld in *Hood v. G. T. R.*, 20 C. P. 361, on the authority of the former case.

But the case on which this important point of carriers law mainly rests in our courts is *Hamilton v. The G. W. R.*, 23 U. C. R. 600, decided in 1864, and as it was both argued and decided entirely upon the authority of English cases, and as it has been followed in several subsequent judgments, it is well worth a careful examination. The head note is as follows:

"Defendants, a railway company, received certain plate glass to be carried for the plaintiff, who signed a paper partly written and partly printed, requesting them to receive it upon the conditions endorsed, which provided that they would not be responsible for damage done to any china, glass, etc., delivered to them for carriage; and defendants gave a receipt with the same conditions upon it. *Held*, that such delivery and acceptance formed a special contract which was valid at common law, and exempted defendants from injury to the goods, even though caused by gross negligence."

The authorities upon which this decision was based, according to the report, are the following:

(1) *Gibbon v. Paynton*, 4 Burr. 2299, decided in 1769. This was an action against the Birmingham stage coachman for £100 in money, sent from Birmingham to London and lost. It was hid in hay in

## COMMON CARRIERS IN ONTARIO.

an old mail bag. The bag and hay arrived safe, but the money was gone. The plaintiff had been notified "that the coachman would not be answerable for money or jewels or other valuable goods, unless he had notice that it was money or jewels or valuable goods that was delivered to him to be carried."

The jury found a verdict for the defendant. The court held that plaintiff had been guilty of a gross fraud, and on this ground the judgments mainly proceed. Mr. Justice Yates, however, held that a carrier may make a special acceptance, and that this was a special acceptance.

There is a wide difference between this special acceptance, and one exonerating the carrier from the negligence of himself or servants.

(2) The next case is *Leeson v. Holt*, 1 Stark. 186, decided in 1816. It consists almost wholly of Lord Ellenborough's summing up to the jury. The defendants relied on a notice intimating that all packages of looking-glass, plate-glass, household furniture, etc., were to be entirely at the risk of the owners as to damage, breakage, etc. His lordship said:

"If this action had been brought twenty years ago, the defendant would have been liable, since by the common law a carrier is liable in all cases, except two—where the loss is occasioned by the act of God, or of the king's enemies using an overwhelming force, which persons, with ordinary means of resistance cannot guard against. It was found that the common law imposed upon carriers a liability of ruinous extent, and in consequence qualifications and limitations of that liability have been introduced from time to time till, as in the present case, they seem to have excluded all responsibility whatsoever, so that under the terms of the present notice, if a servant of the carriers had in the most wilful and wanton manner destroyed the furniture entrusted to them, the principals would not have been liable. If the parties in the present case have so contracted, the plaintiff must abide by the agreement, and

he must be taken to have so contracted if he chooses to send his goods to be carried after notice of the conditions. The question then is whether there was a special contract. If the carriers notified their terms to the person bringing the goods by an advertisement which, in all probability, must have attracted the attention of the person who brought the goods, they were delivered upon those terms; but the question in these cases always is, whether the delivery was upon a special contract."

The jury thereupon gave a verdict for plaintiff.

Now, it is to be observed that this was merely a *nisi prius* dictum of Lord Ellenborough, and the interpretation placed by him upon the notice, namely, that it would have protected the carriers from liability for the wilful and wanton misconduct of their servants, is opposed to several well-considered cases, for example, in *Lewis v. The G. W. R.*, L. R. 3 Q. B. D. 195, and cases there cited.

(3) The next case is *Nicholson v. Willan*, 5 East 507, decided in 1804. There the notice relied on was to the effect that the defendants would not be accountable for any passenger's luggage or any package whatever (if lost or damaged) above the value of £5, unless insured and paid for at the time of delivery, etc. The plaintiff's goods were of the value of £58, and they were not insured or paid for. It was admitted that a wilful and tortious act by the carriers would not have been protected by the notice; but in the absence of any proof of such an act a nonsuit was entered.

(4) The next case referred to was *Jackson's case*, 2 Peake 185, decided in 1850. The plaintiff wished to ship some tea from London to Leeds, and brought the tea to the carrier's office, but the carrier's book-keeper refused to book it unless 2d. was paid for so doing. The plaintiff refused to pay the charge and left the tea, which was subsequently stolen. Lord Kenyon said:—

## RECENT ENGLISH DECISIONS.

"When no rate is fixed by law the carrier is entitled to say on what terms he will carry; he is not obliged to take everything which is brought to his warehouse, unless the terms on which he chooses to undertake the risk are complied with by the person who employs him." And a nonsuit was accordingly entered.

This decision merely relates to the duty of the shipper as regards payment of the carrier's charges. It was not contended that if the charges had been paid the defendant would not have been liable.

(5) The next case relied on in *Hamilton v. The G. T. R.* is *Harris v. Packwood*, 3 Taunt. 264, decided in 1810. The notice relied upon by the defendant was that he would not be accountable for any package whatsoever above the value of £20, unless entered, and an insurance paid over and above the price charged for carriage, according to their value. The parcel in question was worth £126, but was not entered nor was any insurance paid. The court held that in the absence of proof of express negligence the plaintiff could not recover.

These seem to be the authorities upon which the decision in *Hamilton v. The G. T. R.* is based, according to the report. There are several other cases referred to, but as they bear against the decision, I shall quote them in their appropriate connection. The above cases at most appear to decide that prior to the Carriers Act, carriers were permitted, by notice brought home to the shipper, to qualify their common law liability to a certain reasonable extent, and no doubt the cases referred to in *Hamilton v. The G. T. R.*, were the strongest which could be found.

But in none of these did the carrier, when paid his reasonable charges for carriage, attempt to contract himself out of liability for the negligence of himself or his servants. Such an encroachment upon the common law would not have

been tolerated as will appear, I think clearly, from the authorities to which am about to refer.

(To be continued.)

## RECENT ENGLISH DECISIONS.

The July numbers of the *Law Reports* comprise 17 Q. B. D., pp. 137-309; 11 P. D., pp. 69-76; and 32 Chy. D., pp. 245-398.

## MARRIED WOMAN—JUDGMENT AGAINST MARRIED WOMAN—RESTRAINT ON ANTICIPATION.

Taking up the cases in the Queen's Bench Division, the first to be noticed is *Draycott v. Harrison*, 17 Q. B. D. 147, which is deserving of attention, both in regard to the point of practice involved, but also for the light it throws on the effect of the Married Women's Property Act of 1882, from which our Act of 1884 was taken. A judgment had been obtained against a married woman which, however, contained the special clause, "but that the execution hereon be limited to the separate property of the said defendant not subject to any restraint on anticipation (unless by reason of the Married Women's Property Act, 1882, such property or estate shall be liable to execution notwithstanding such restraint)." The only separate property the defendant was entitled to was an annuity of £180, which was subject, by the terms of the will under which it was payable, to a restraint against anticipation. After the receipt of sufficient instalments of the annuity to have enabled the defendant to satisfy the judgment debt, the plaintiff applied to a County Court Judge, and obtained an order to commit her to prison for 14 days for not paying the debt, having the ability to do so. From this order the defendant appealed. The plaintiff's counsel contended that there was no appeal, but the court, without deciding that question, said that in order to save expense and have the real question determined at once, it would mould the motion into the form of a rule for a prohibition, which would be the appropriate remedy, assuming the judge had no jurisdiction to make the order complained of. And on the merits the court (Mathew and A. L. Smith, JJ.) set aside the order, holding that the section 5 of the Debtors Act, 1869, under which it was pur-



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ported to be made, only authorized the order when there was a personal liability on the part of the judgment debtor to pay the debt, and that a judgment in the form above given created no personal liability. And furthermore, that the property the defendant married woman had, being subject to a restraint against anticipation, was not, in fact, property within the intent and meaning of the Act.

## LIBEL—DISCOVERY.

In *Marriott v. Chamberlain*, 17 Q. B. D. 154, an application was made to compel the plaintiff to make further discovery under the following circumstances. In the course of an election contest the plaintiff had publicly charged the defendant with having written and sent a certain letter for the purpose of gaining a monopoly in his trade, and he stated that he had seen a copy of the letter, that his informant was a solicitor of high standing, and that two of the letters existed, one in the keeping of an eminent banking firm, and the other in the hands of a firm of manufacturers. Subsequently the defendant published a statement denouncing the plaintiff's statement as untrue, and the letter referred to as a fabrication, for which the plaintiff brought the present action of libel. The defendant pleaded that the alleged libel was true, and sought to compel the plaintiff to disclose the names and address of the "solicitor of high standing," and also of the firms alleged to hold the letters in question. The plaintiff sought to evade this discovery on the ground that he intended to call these parties as witnesses, but the Court of Appeal (affirming the order of Mathew, A. L. Smith and Field, JJ.) held that the defendant was entitled to the discovery.

**MARRIED WOMAN—TORT COMMITTED DURING COVERTURE**  
—LIABILITY OF HUSBAND—MARRIED WOMAN'S PROPERTY ACT, 1884, OBT.

*Seroka v. Kattenburg*, 17 Q. B. D. 177, is one of the numerous cases which show how very difficult it is for the legislature, when dealing with the rights of married women, to effectuate what may presumably be considered to have been its real intention. Formerly, as our readers are aware, by the common law the husband by virtue of the marriage became the owner of his wife's personal property, and also a very substantial interest in her real estate. By various statutes, supposed to be in

accordance with the necessities of modern civilization, all this has been changed, and a husband has now been virtually deprived of all interest in his wife's property, real or personal, during her lifetime. The common law, while giving the husband extensive rights in his wife's property, also imposed on him certain liabilities, and he was answerable for her torts committed during coverture. It now appears from this case that although the Married Women's Property Acts have divested the husband of the rights he was formerly entitled to in his wife's property, they have nevertheless left him burthened with the responsibility for her torts. The action was for libel by the female defendant. Her husband, who was made a co-defendant, contended that the statement of claim disclosed no cause of action against him, but the court (Mathew and A. L. Smith, JJ.) held that the Act of 1882, though relieving a husband of liability for torts committed by his wife before coverture, left him responsible for those committed by her during coverture, notwithstanding the provision enabling the wife to be sued without her husband. We cannot believe that this carries out the real intention of the legislature.

**PRACTICE—NOTICE OF MOTION RETURNABLE ON DIES NON**  
—AMENDMENT.

In *Williams v. De Boinville*, 17 Q. B. D. 180, a notice of motion had been given returnable on a day on which the court did not sit, "or so soon thereafter as counsel could be heard." The opposite party appeared at the next sitting of the court and took the objection; but the court (Manisty and Mathew, JJ.) allowed the notice of motion to be amended. See *McGaw v. Ponton*, 11 P. R. 328.

**EXECUTION CREDITOR—GARNISHEE ORDER—PAYMENT**  
INTO COURT—RECEIPT OF DEBT.

The short point determined by Manisty, J., in *Butler v. Wearing*, 17 Q. B. D. 182, is that where, in consequence of a third party intervening in a garnishee application, the money attached is ordered to be paid into court to abide further order, that does not constitute a receipt of the money by the attaching creditor as against a trustee in bankruptcy of the judgment debtor, even though the third party withdrew his claim subsequent to the appointment of the trustee.

## RECENT ENGLISH DECISIONS.

**MASTER AND SERVANT—EMPLOYERS' LIABILITY ACT, 1880  
(49 VICT., C. 28, ONT.)—MEANING OF "WORKS."**

In *How v. Finch*, 17 Q. B. D. 187, Mathew and A. L. Smith, JJ., decided that the term "works" used in *The Employers' Liability Act*, s. 1. (see 49 Vict., c. 28, s. 3, O.) includes only completed works, and not works in course of erection, which when completed are intended to form part of the premises used by the employer.

**MARINE INSURANCE—BURSTING OF ENGINE.**

In *Hamilton v. Thames M. I. Co.*, 17 Q. B. D. 195, the question was whether damage occasioned by the bursting of the air chamber of an engine was covered by an insurance against "all the perils, losses and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject matter of insurance or any part thereof." The engine was employed in the ordinary course of navigation to pump water into the boilers; but in consequence of a valve, which should have been open, being either by negligence or accident closed, the water was forced into the air chamber of the engine, which was split open. On the authority of *West India Telegraph Co. v. Home and Colonial Insurance Co.*, 6 Q. B. D., 51, Mathew and A. L. Smith, JJ., held that the plaintiffs were entitled to recover, and this decision was affirmed in the Court of Appeal by Lindley, and Lopes, LL.J., Lord Esher dissenting. It may, perhaps, be useful to quote from the concluding words of the judgment of the majority of the Court of Appeal the following passage:

We do not think that the general words include all losses that may happen during a voyage by accident; but we think the general words cover all losses incident to the navigation of a vessel during the voyage, inclusive of losses arising from negligence or improper management, because these are *ejusdem generis* with perils of the sea.

**RAILWAY COMPANY'S PASSENGER'S LUGGAGE—DELIVERY  
TO PORTER.**

Fifteen pages of the reports are occupied by the case of *Bunch v. The G. W. R'y Co.*, 17 Q. B. D., 215, which was brought to compel the defendants to make good the loss of a "Gladstone" bag, which the plaintiff had left for ten minutes in charge of the defendants' porter while she went to get her ticket and meet her husband. The Court of Appeal held

the defendants liable; but Lopes, L.J., dissented, because the bag in question was to have been put in the carriage with the plaintiff instead of in the luggage van, and he considered it was not the porter's duty to take charge of luggage except for the time reasonably necessary for placing it in the luggage van.

**FRAUDULENT CONVEYANCE—13 ELIZ., C. 5—VOLUNTARY  
SETTLEMENT FOR WIFE AND CHILD.**

*Ex parte Mercer*, 17 Q. B. D. 290, is a decision of the Court of Appeal affirming a judgment of Cave and Grantham, JJ. The case arose in bankruptcy; but the point involved is one of general interest. A man was married in Hong Kong on 31st May, 1881. In the following August an action was commenced against him by a lady in England for breach of promise of marriage, in which the writ was served on him in Hong Kong on 8th October following. At the time of his marriage he was entitled to a legacy of £500, which had become vested in possession by the death of his mother on May 11, 1881; but he was ignorant of her death until October, 1881, and on the 17th of that month, having learned of her death and that he was entitled to the legacy, he immediately executed a voluntary settlement of the fund, whereby he assigned it to a trustee to pay the income, during the joint lives of himself and wife, to the wife for her separate use, and after the death of either of them to pay the income to the survivor for life, and on the death of the survivor to hold the fund for the children of the marriage, and in default of children for the husband absolutely. On 20th July, 1882, judgment was recovered against the settlor in the action for breach of promise for £500 damages, and costs; and on 14th November, 1884, he was adjudicated a bankrupt, and the trustee in bankruptcy claimed to have the voluntary settlement declared void under the Statute of Elizabeth. The settlor swore that the settlement was *bona fide* for the purpose of making a provision for his family, and that he had no creditors, and that he had regarded the service of the writ as a mere threat, and fully expected the action would not have been prosecuted. The court came to the conclusion that there was no evidence of any fraudulent intent to defeat creditors, and the voluntary settlement was therefore upheld.

## RECENT ENGLISH DECISIONS.

ADMINISTRATION WITH WILL ANNEXED—REVOCATION—  
MARRIED WOMAN.

The only case in the Probate Division which it is necessary to note, is *In the Goods of Reid*, 11 P. D. 70. This was an application to revoke letters of administration, with the will annexed, which had been granted to a woman who had subsequently married. She had contracted to sell certain leaseholds of the estate, but the purchaser objected to complete the purchase unless her husband joined in the conveyances; her husband, however had deserted her, and his concurrence could not be obtained. For the purpose of completing the sale it was desired that the letters of administration should be revoked and a new grant made to a third party, but Brett, J. held this could not be done, and the Court of Appeal affirmed his decision.

## SOLICITOR—AGENT.

Turning now to the cases in the Chancery Division, *In re Scholes*, 32 Chy. D. 245, deserves a brief notice. London solicitors, acting for country solicitors duly authorized, obtained an order for taxation of costs. The petition for the order was indorsed with their own name without the name of their principals. On motion of the client the order was set aside as irregular, but without costs.

## STATUTE OF FRAUDS—GUARANTY—CONSIDERATION.

In *Miles v. New Zealand Alford Estate Co.*, 32 Chy. D. 266, the plaintiff was equitable mortgagee of certain shares in the defendant company, of which he had given notice to the company. By the terms of the articles of association, it was declared that the company should have a first and paramount lien upon the shares of every member for his debts, liabilities, and engagements to the company. After the plaintiff had given notice of his mortgage, the mortgagor, who was also a director of, and vendor to the company, was threatened with proceedings, and in consequence gave a written guaranty for the payment of a minimum dividend for the period of ninety years. No consideration for the giving of the guaranty appeared on the face of the instrument. The defendants claimed to be entitled to priority in respect of this guaranty over the plaintiff's mortgage. North, J. held that there was sufficient consideration for the

guaranty, but following the decision of Field, J., in *Bradford Banking Co. v. Briggs*, 29 Chy. D. 149, which had not then been reversed, he held the defendants were not entitled to priority. On appeal, Cotton and Fry, LL.J., although agreeing that if there had been a valuable consideration for the guaranty the defendant company would have been entitled to priority on the authority of the decision of the Court of Appeal in *Bradford Banking Co. v. Briggs*, 31 Chy. D. 19, were however of opinion that there was no sufficient evidence of any intended claim by the company or the shareholders against the guarantor; or any contract binding the company to abandon such claim, and therefore, that the guaranty was without consideration. Bowen, L.J., on the other hand, agreed with North, J. The result was that although the majority of the Court of Appeal differed with North, J., on both points, they nevertheless affirmed his decision.

## LUNATIC—VENDOR AND PURCHASER—TRUSTEE ACT, 1850

In *Re Colling*, 32 Chy. D. 333, certain persons having been authorized by the court to make sale of certain property of a lunatic, effected a sale, but, before payment of the purchase money or execution of the conveyance, the lunatic died. The present application was made under the Trustee Act, 1850, to have the deceased lunatic declared a trustee, and for the appointment of another person as trustee to complete the sale. But the Court of Appeal held the order could not be made; that a vendor cannot be deemed a trustee within the Trustee Act until he had been so declared by the decree of the court, inasmuch as there may always be a question whether the contract could be enforced by a suit for specific performance; and that it would be extremely inconvenient to declare a vendor a trustee upon a petition on which that point could not be decided.

JOINT STOCK COMPANY—SUBSCRIPTION FOR SHARES BY  
AGENT VERBALLY APPOINTED.

In *re Whitely*, 32 Chy. D. 337, was an application by a person who had been placed on the list of contributories of a company being wound up to have his name removed, on the ground that the subscription for the shares had been made by an agent verbally appointed, and was therefore not binding. But the Court of Appeal (affirming Bacon, V.C.) held that

## RECENT ENGLISH DECISIONS.

there being nothing in the statute requiring a special mode of signature, the ordinary rule applied that signature by an agent was sufficient, and, that though it was irregular for the agent to sign the name of his principal without denoting that it was signed by attorney, the signature was not on that ground invalid.

## COMPANY—WINDING UP—SERVICE OUT OF JURISDICTION.

In *Re Anglo-African Steamship Co.*, 32 Chy. D. 348, an application was made to Kay, J., to authorize service of an order for a call upon certain contributories out of the jurisdiction, which was refused, and the Court of Appeal affirmed the decision. Cotton, L.J., says:

Service out of the jurisdiction is not a power inherent in the court, but is only given by statute so as to be binding on British subjects, and not on others. There is no proof that the persons to be served are British subjects. But if they are, I am of opinion that the court has no jurisdiction to make the order asked for,

See *Re Busfield*, ante, p. 239.

## PARTNERSHIP—ACTION TO COMPEL PARTNER TO SIGN NOTICE OF DISSOLUTION FOR PUBLICATION—COSTS.

*Hendry v. Turner*, 32 Chy. D. 355, was an action brought to compel a retiring partner to sign a notice of dissolution for publication in the *Gazette*, no other relief being claimed. Pending the suit the defendant signed the notice, and a summons was then taken out by plaintiff, asking that defendant might be ordered to pay all the costs of the action. It was contended by the defendant that the action would not lie, but Kay, J., held that it would, and he ordered the defendant to pay the costs.

## SETTLEMENT—AFTER ACQUIRED PROPERTY—RESTRAINT ON ANTICIPATION.

In *Re Currey*, *Gibson v. Way*, 32 Chy. D. 361, it was held by Chitty, J., that a restraint on anticipation is equivalent to a restraint on alienation, and therefore property of a married woman, acquired by her after marriage for her separate use, subject to such restraint, was not bound by a covenant for settlement of after acquired property contained in her marriage settlement.

## WINDING UP ORDER—DISCHARGE OF EMPLOYEES.

In *Macdowall's case*, 32 Chy. D. 366, Chitty, J., held that the rule established by *Re Chapman*, 1 Eq. 346, that an order for winding up a company operates as a notice of discharge to the servants of the company when the business of

the company is not continued after the date of the order, applies though the liquidator, without continuing the business, employs the servants in analogous duties to those previously performed by them for the company, with a view to reconstruction.

## COMPANY—WINDING UP—PETITION BY EXECUTOR.

In *Re Masonic G. L. A. Co.*, 32 Chy. D. 373, Pearson, J., held that the executor of a creditor is entitled to present a winding up petition before he has attained probate, and that it is sufficient if he obtain probate before the hearing of the petition.

## EASEMENT—LEASE—MERGER.

*Dynevor v. Tennant*, 32 Chy. D. 375, is a decision of Pearson, J., on the law of easements. The facts of the case were shortly these: Three joint owners of an estate granted a lease for 1,000 years of a certain strip running through it, for the purpose of making a canal, reserving the right to build bridges over the canal. Subsequently the three lessors partitioned the estate, and the bed of the canal was allotted to one of them who subsequently sold his reversion in it to the lessee through whom the defendant claimed. The plaintiff, who was a successor in title of one of the other co-owners, claimed the right under the reservation in the lease to build a bridge across the canal for the purpose of connecting certain parts of his estate which it intersected. Pearson, J., held that the easement was extinguished by reason of the reversion in the bed of the canal having become vested in the lessee, which had the effect of putting an end to the lease.

## ACCUMULATION OF ENTIRE INCOME—MAINTENANCE.

The case of *In re Alford*, *Hunt v. Parry*, 32 Chy. D. 383, was one in which an attempt was made to induce the court to extend the principle of *Havelock v. Havelock*, 17 Chy. D. 807, without success. A testator gave his real estate and his residuary personal estate upon trust to accumulate the income for twenty years after his death, and subject to such trust upon trust for a nephew for life, with remainder to his first and other sons successively in tail. No provision was made for the maintenance of the nephew, who was an infant at the time of the testator's death. During his minority the court had, notwithstanding the trust

## TRANSFERRED MALICE.

for accumulation, authorized the application of £300 a year for his maintenance. On his coming of age the present application was made to the court to continue the allowance to enable him to adopt the profession of a solicitor, but Pearson, J., refused to make any further order, considering he was bound to "allow the testator's folly to prevail."

## SELECTIONS.

## TRANSFERRED MALICE.

In *Regina v. Latimer*, noted in this week's Notes of Cases, the Crown Court decide that if a man strike at another and wound a woman he is guilty of unlawful and malicious wounding within the statute 24 & 25 Vict., c. 100, s. 20. The Lord Chief Justice was of opinion that *Rex v. Hunt*, 1 M. C. C. 93, a decision of all the judges briefly reported, virtually decided the question, but a close examination of that case shows that it was little in point. The indictment was not for maliciously wounding, but for feloniously cutting. No one doubts that if a man meaning murder kills the wrong man he is guilty of murder, and so of a felonious assault, but the law of murder depends on the common law. The question was whether the word "maliciously" in a statute is satisfied by a malice which had a different object for the blow. In *Regina v. Pembliton*, 43 Law J. Rep. M. C. 91, it was held that to aim at a man and to smash a window is not malicious; now it is held that to aim at a man and wound a woman is malicious. The distinction is fine, but it is probably sound, and ingenuity might suggest many similar complications of motive and act which chance-medley might bring about. For example, is it malicious to aim at a horse and wound the rider? We suppose it is, on the authority of the present decision, although the poor horse, hit in mistake for the rider, would probably be no better off than the plate-glass. The distinction is perhaps unsound in strict logic, but the fact is that the law very properly takes care of human life and limb, and when they are in danger ignores meta-

physics. In the reign of William Rufus, we believe, the doctrine was carried further, and it was contended that when the man was a king it was treason to kill him in shooting at a stag, but as Coke gravely points out, Tyrrell was no poacher, but shot at a stag in the royal forest at the king's command, and the king's death was legally an accident. Personally Tyrrell was not, we believe, confident of the soundness of his legal position, and was called away to the Crusades. The case suggests another complication. A man meaning to kill a fellow-subject kills the king. Is that treason, or murder, or neither? We commend this conundrum to debating clubs.—*Law Journal*.

The Court for the Consideration of Crown Cases Reserved last Saturday expressed their gratification at being able to deliver a judgment upon a question of considerable importance. Not because they were thereby laying down any new principles with regard to the criminal law, for, as they said, the case before them was clear, but for the decision of the court upon a case which, until examined, was apparently on all-fours with the case upon which they were called upon to decide, and which, to a certain extent, placed a qualification upon the application of the well-known doctrine that where a person in the execution of an unlawful act causes damage or injury, if such damage or injury was the natural consequence of the unlawful act, the law presumes malice upon the part of the person engaged in the unlawful act. The case before the court on Saturday was one in which a man named Latimer had been convicted upon an indictment for unlawfully and maliciously wounding Ellen Rolston under the following circumstances: Latimer and a man named Chapple had been quarrelling in a room, and Latimer had left the room and returned with a belt in his hand. In passing hastily through the room Latimer aimed a blow with the belt at Chapple, and struck him slightly, but the belt bounded off and struck Ellen Rolston, who was standing talking to Chapple, and wounded her severely. These being the facts, the learned Recorder, before whom the case was tried, left the following questions to the jury:—"1. Was the blow struck at Chapple in self-defence to get through the room, or unlawful and mali-

## TRANSFERRED MALICE.

ciously? 2. Did the blow so struck, in fact, wound Ellen Rolston? 3. Was the striking Ellen Rolston purely accidental, or was it such a consequence as the prisoner should have expected to follow from the blow he aimed at Chapple?" and the jury found: "1. That the blow was unlawful and malicious; 2. That the blow did, in fact, wound Ellen Rolston; 3. That the striking Ellen Rolston was purely accidental, and not such a consequence of the blow as the prisoner ought to have expected." Upon these findings a verdict of guilty was entered, and the question before the Court for the Consideration of Crown Cases Reserved was, whether upon the facts and the findings of the jury the prisoner was rightly convicted of the offence for which he was indicted. The Court held that he was, and the only difficulty which they experienced in coming to that decision arose in consequence of their previous decision in the case of *Reg. v. Pembliton* (L. Rep. 2 C. C. R. 119). In that case the prisoner had been fighting with persons in a street, and threw a stone at them, which struck a window and did damage to an amount exceeding £5. He was indicted under the Malicious Injury to Property Act for "unlawfully and maliciously" causing this damage. The jury convicted him, but found that he threw the stone at the people he had been fighting with, intending to strike one or more of them, but not intending to break the window: and the Court for the Consideration of Crown Cases Reserved held, that by this finding the jury negated the existence of malice, either actual or constructive, and the conviction must therefore be quashed. Now, as in *Reg. v. Latimer*, the prisoner was indicted for "unlawfully and maliciously" wounding Ellen Rolston, it was naturally argued, upon the authority of *Reg. v. Pembliton*, that, as the jury had found that the striking of Ellen Rolston was purely accidental, they had here too negated the existence of malice, either actual or constructive, and that therefore the prisoner could not be convicted. At first sight it would, no doubt, appear impossible to distinguish the two cases; but when once the learned counsel for the prisoner was obliged to admit in answer to the bench that had Ellen Rolston been killed instead of only being wounded, the prisoner would clearly have

been guilty of manslaughter, it became obvious that the case of *Reg. v. Pembliton* must in some respect be distinguishable. In the first place, the Master of the Rolls expressed his dissent with the third question which was left to the jury, as not being a material question, and pointed out that, under 24 & 25 Vict., c. 100, s. 20, under which the prisoner was indicted, the question was whether the prisoner unlawfully and maliciously wounded any other person; and although the use of the word "maliciously" rendered it necessary that the prisoner should be proved to have intended to wound, yet the section was quite general, and therefore it was not necessary to prove that the prisoner intended to wound the person actually wounded. The question for the jury therefore was, whether the prisoner, intending to wound some person, wounded a particular person. This at once led to the possibility of distinguishing the case of *Reg. v. Pembliton* from the case before the court, for in the former case the prisoner was indicted under 24 & 25 Vict., c. 97, s. 51, under which section the offence was to unlawfully and maliciously commit any damage to any property whatsoever; and it was therefore necessary, in order to convict under the section, that the prisoner should have committed damage to property intending to commit damage to some property. In *Reg. v. Pembliton* the jury having negated the fact that the prisoner intended to commit damage to any property at all, it followed that the evidence did not support the indictment, which charged that the prisoner "maliciously did commit damage, injury and spoil upon a window." In this way the court, while they approved of the decision in *Reg. v. Pembliton*, showed that it was clearly distinguishable from the case before them, and added that, had the prisoner there been found to have intended to commit damage to property, though other than the property actually damaged, and in the execution of such intention had damaged the window actually damaged, the decision would probably have been different. For, as Mr. Justice Blackburn in that case said: "The jury might perhaps have found on this evidence that the act was malicious, because they might have found that the prisoner knew that the natural consequence of his act would be to break

## TRANSFERRED MALICE—SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS V. COURSOLES.

the glass, and although that was not his wish, yet that he was reckless whether he did it or not; but the jury have not so found, and I think it is impossible to say in this case that the prisoner has maliciously done an act which he did not intend to do." The case of *Reg. v. Pembliton* being thus distinguished, it only remained for the court to apply to the case before them the ordinary rule of law that, where it is necessary to prove an act was done maliciously, it is not necessary to prove malice on the part of the prisoner against a particular individual, and Lord Coleridge, C.J., pointed out that, but for the case of *Reg. v. Pembliton*, the case was *res judicata*, for in *Reg. v. Hunt*, in 1825 (1 Moo. C. C. 93), it was held that, on an indictment for maliciously cutting, malice against the individual cut is not essential; general malice is sufficient. On behalf of the prisoner in *Reg. v. Latimer*, it was argued that the decision in *Reg. v. Hewlett*, in 1858 (1 F. & F. 91), was to the contrary effect, for there it was held that where a person strikes A., and B. interposing receives the blow, a conviction for wounding with intent to do grievous bodily harm to B. cannot be sustained. But the Court pointed out that there Mr. Justice Crowder said the evidence would not sustain the charge of wounding with intent to do grievous bodily harm to B., but that the prisoner might be convicted of unlawfully wounding. The case of *Reg. v. Faulkner*, (13 Cox C. C. 550) was also cited on behalf of the prisoner. In that case a sailor entered a part of a vessel for the purpose of stealing rum, and while he was tapping a cask of rum a lighted match, held by him, came in contact with the spirits which were flowing from the cask, and a conflagration ensuing the vessel was destroyed, but the prisoner was nevertheless acquitted of the crime of arson. Mr. Justice Barry, in delivering his judgment in that case, said: "Perhaps the true solution of the difficulty is, that the doctrine of constructive malice or intention only applies to cases where the mischief with which the accused stands charged would be, if maliciously committed, an offence at common law. . . . The jury were, in fact, directed to give a verdict of guilty upon the simple ground that the firing of the ship, though accidental, was caused by an act

done in the course of, or immediately consequent upon a felonious operation, and no question of the prisoner's malice, constructive or otherwise, was left to the jury;" and the Court in *Reg. v. Latimer* pointed out that in *Reg. v. Faulkner* there was no evidence of malice at all which could have been left to the jury.—*Law Times*.

## REPORTS.

## MAGISTRATES' CASES—POLICE COURT.

## SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS V. COURSOLES.

## 43 Vict. cap. 38, sec. 2—Torturing domestic birds.

Pigeon shooting from traps at a shooting match, accompanied by the usual cruelty and misusage incident to the birds under such circumstances,

*Held*, not to be an offence under the above statute.

[Ottawa, July 15, 1886.]

The complaint was laid under 43 Vict. cap. 38, sec. 2—"Whosoever wantonly, cruelly or unnecessarily beats, abuses or tortures any domestic bird shall," etc.

From the evidence of Mr. Baker, secretary of the Metropolitan Society for the Prevention of Cruelty, it appeared that the pigeon-shooting tournament was advertised as under the conduct of the St. Hubert Gun Club. The matches were open to all who paid the entrance fees. The shooting was for various prizes as advertised. It took place in the south-eastern portion of the city. The defendant was one of those who took part in the shooting. The birds used were tame or domesticated pigeons. They were brought into the field from a barn, in which they had been stowed for some time in boxes. They were greatly overcrowded in the boxes; and were left exposed to the sun in this crowded condition until required to be shot at. They were taken out by a boy and placed singly in traps; these were small boxes of sheet iron so constructed that upon a rope being pulled it fell apart and freed the bird. A second rope was used with one end fastened beyond the box by which the bird was beaten or whipped up till forced to fly.

The first bird placed for Coursolles was whipped up. It rose; was fired at, and wounded; one leg apparently broken and the wing disabled. It was

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left fluttering on the ground until others had been placed in the traps, and another shooter had taken his stand, when the judge or referee called out, "gather your bird, Mr. Coursolles." The boy was sent out, caught and carried it in, wrung its neck and threw it into a pile of dead birds. The great majority of the birds did not rise until beaten up by the whipping-up rope. They almost invariably flew towards the shooters. Many were so crippled from confinement as to be unable to rise from the ground, and after further trial were pronounced "no birds" by the judges. These were put into a separate box as useless for the purpose of living targets. Many were wounded and escaped outside the bounds. One bird was fired at and flew in among the crowd. It was followed up by the shooter who after some time succeeded in knocking it down with his hand inside the rope. He carried it to the judges, who after long handling and examination, and failing to detect traces of blood drawn by the shot, pronounced it "no bird"; its neck was then wrung, and its body thrown into the pile. The birds bore evidence of having been badly treated before being fired at. Saw several left rotting on the field after being shot. I witnessed the shooting at clay pigeons which are thrown into the air by a spring trap; these were more difficult to hit than the live birds, and furnished tolerable practice.

*Dr. R. F. Wicksteed.*—The object of the prosecuting society, and of the law under which it works, is twofold—deterrent and educational. Every act of cruelty which is perpetrated is a practical lesson in immorality. We wish to protect the animals, and also to prevent scenes which are calculated to harden the minds of the people. In this case we have to prove that the act complained of was: 1st, committed within the jurisdiction of the magistrate; 2nd, that the birds shot at were domestic; 3rd, that the birds were cruelly or unnecessarily ill-treated, abused or tortured; 4th, that they were so abused, etc., by the party summoned.

The first and fourth points have been proved by the witness Baker. As to the third point, the birds used were common house pigeons. Do they come under the class, "domestic birds," of the statute? This may be inferred from the remarks of the judges in *Bridge v. Parsons*, 32 L. J. N. S. See also, Dallas' *Natural History*, p. 497, and Nicholson's *Manual of Zoology*, where we find the expressions "domestic varieties" and "common domestic breeds of pigeons."

The third and most important point we have to make is—were the birds unnecessarily abused and tortured? Judge Grove, in *Swan v. Saunders*, 44 L. T., 426, says, "I prefer to define cruelty

as unnecessary ill-usage by which the animal substantially suffers." Now, although these birds may have been bought for the market, and the defendant and his companions were only acting the part of amateur butchers or poulterers, yet the work of killing was bunglingly done, and the calling in of these men and the use of the shot gun, I hold to be unnecessary ill-usage; the birds substantially suffered, and we have the definition of cruelty complete. Scientific men and even sportsmen admitted that under any conditions the shooting of pigeons from a trap was an act of cruelty and brutality. In the debates in the English House of Commons on 5 & 6 W. IV. c. 59, 1835, Col. Sibthorp said, "I think shooting and hunting are amusements which none will deny to be cruel." Sir M. W. Ridley said, "In my opinion the amusements of hunting, coursing, shooting and fishing are as much breaches of the Act as cock-fighting and bull-baiting"; see "Mirror of Parliament," vol. 29, 1835, p. 1883.

In *Temple Bar*, 1870, p. 367, we read, "What applies to any shooting in the matter of cruelty applies to all—pigeon-shooting included. Nevertheless, we feel strongly tempted to some sort of agreement with Mr. Freeman when he calls it 'the lowest brutality of all,' because the tameness of the quarry, and the total absence of some of the nobler elements of sport—such as adventure, exercise and the pitting of one's wits against the instinct of the animal—almost degrades this particular pastime to amateur butchery."

W. Stanley Jevons, in the *Fortnightly Review* for 1876, p. 674, says: "Can any one deny that what is known as sport—including hunting, coursing, deer-stalking, shooting, battue-shooting, pigeon-shooting and angling—is, from beginning to end, mere diversion founded on the needless sufferings of the lower animals."

Stonehenge, in his "Encyclopaedia of Rural Sports," writes: "All pursuit of game merely for sport has an element of cruelty attending it; and it should always be remembered that this stain must be subdued, and, if possible, washed out by the many counterbalancing advantages." And again, "There can be no reason why hunting or shooting should not be carried on without any drawback, except the inherent cruelty attending upon them."

Robert Blakey, in his work on shooting, writes of pigeon-shooting: "Looking to its attraction as a matter of sport, little or nothing can be said in its favour, when put into competition with the more noble and manly enjoyment of the sports of the field."

An able writer in the *Cornhill Magazine*, vol. 29, 1874, p. 218, expresses himself in these forcible



terms: "As regards shooting, there are forms of the sport which seem carefully designed to exclude the fatigue, the exposure, the uncertainty, which give it genuine excitement, and to substitute an excitement which, as being chiefly sustained by the quantity of game killed, belongs rather to the poulterer than to the sportsman. There is no inconsistency, therefore, in saying that pigeon-shooting is cruel, and that deer-stalking and partridge-shooting is not cruel. The pigeon suffers no more than the partridge, but he suffers without any man being the better for it. The one sport is a source of health and pleasant excitement; the other gives just so much health as can be imparted by a drive from London to Fulham, and so much excitement as might be obtained on a croquet lawn, provided that the balls could feel pain. Everything that tends to make sport physically easy tends in the same proportion to make it morally hurtful. The line between the man who loves cruelty for cruelty's sake and the sportsman would soon be effaced if the ideas of exertion, of self-denial, of endurance, of labour, of submission to privation, were altogether dissociated from field sports."

Dr. Wicksteed concluded by remarking that a very perfect bill against cruelty to animals, forbidding the use of live animals as targets, had been introduced into the House of Commons last session, but had been burked through the influence of the gun clubs.

O'GARA, Q.C., Police Magistrate.—There has been nothing illegal proven under the statute. The prosecution had better wait until public opinion had changed the law. There is no question but that if a bird be properly shot it suffers less than if it had its head cut off. If a man were to kill a sheep, and yet not cut the right artery, he could not be punished. The intention of the party shooting was clearly to kill the bird: if he failed it was an accident.\* The case is dismissed.

Wicksteed, Bishop and Greene, for the prosecuting society.

Christie and Belcourt, for the defendant.

\* With many so-called sportsmen the killing and not the wounding would be the accident. Apart, however, from this practical observation there will be many who will doubt the soundness of this decision.—Editor *Law Journal*.

## NOTES OF CANADIAN CASES.

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### COURT OF APPEAL.

Osler, J.A.]

[July 16,

REGINA V. SANDERSON.

*Canada Temperance Act—Offence—Conviction—  
Habeas Corpus—Certiorari—Distress warrant—  
Commitment.*

A prisoner having been convicted of an offence under the Canada Temperance Act, an application for her release was made under a *habeas corpus*, and a writ of *certiorari* was also issued,

*Held*, that the writ of *certiorari* must be superseded, and following *Regina v. Wallace*, 4 O. R. 127, that such writ cannot issue merely for the purpose of examining and weighing the evidence taken before the magistrate.

*Held*, also, that no minute of the conviction need be served on the defendant, and that she must take notice of the conviction at her peril.

*Held*, also, that the truth of the return of the distress warrant cannot be tried upon affidavits.

*Held*, also, that the bailiff's duty was to execute the warrant of commitment, and that he had no authority to receive the penalty and costs.

*Held*, also, that the warrant of commitment need not be dated at all if not issued too soon.

*Held*, also, that the conviction was regular on its face, and could not be reversed or quashed on this application. While unreversed it warranted the commitment, and the prisoner was therefore remanded.

Kappele, for the application.  
Irving, Q.C., contra.

[Prac.]

NOTES OF CANADIAN CASES—CORRESPONDENCE.

## PRACTICE.

C. P. Div. Court.]

[June 26.]

## IRELAND V. PITCHER.

*Action against magistrates—Costs, scale of—R. S. O. ch. 73, secs. 12, 18, 19—Appeal from taxation—Time—Rule 427 O. J. A.*

In an action against Justices of the Peace for false imprisonment, etc., the Divisional Court (10 O. R. 631) ordered judgment to be entered for the plaintiff for \$25, the damages assessed by the jury, leaving the costs to be taxed according to such scale and with such rights as to set-off as the statute and rules of court might direct. Upon appeal from taxation,

*Held* (CAMERON, C.J., *dubitante*), that the effect of R. S. O. ch. 73, sec. 19, read in connection with sec. 12 of that Act, and with R. S. O. ch. 43, sec. 18, sub-sec. 5; R. S. O. ch. 47, sec. 53, sub-sec. 7; and R. S. O. ch. 50, sec. 347, is not to provide that the plaintiff should have costs on the Superior Court scale when his recovery is within the competence of an inferior court.

*Per* CAMERON, C.J.—The case came under sec. 18 rather than 19 of R. S. O. ch. 73.

*Per Curiam*.—The action was within the proper competence of the Division Court, and the plaintiff should have costs only on the scale applicable to that court, and the defendants should have their proper costs by way of deduction or set-off.

Appeals from taxation should be brought on within a reasonable time, and within eight days—the time limited for appeals—under rule 427 O. J. A., is a reasonable time.

*Stark v. Fisher*, 11 P. R. 235, and *Quay v. Quay*, 11 P. R. 258, approved.

*Aylesworth*, for the appeal.

*Back*, contra.

## CORRESPONDENCE.

## ULTRA VIRES.

RAILWAYS TO THE PROVINCIAL BOUNDARIES.

*To the Editor of the LAW JOURNAL:*

SIR,—Can a Provincial Legislature, under the British North America Act, validly create a company with power to construct a line of railway running to the boundary of the Province?

This is a question that has been much debated of late years, more especially in connection with the repeated disallowance of Manitoba railway charters, and it is with the hope of removing some of the doubts thrown around it by the politicians that I write this letter. Let me first set down the language of the B. N. A. Act governing the subject.

Sec. 92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say—

ss. 10. Local works and undertakings other than such as are of the following classes:

(a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province.

(c) Such works as, although wholly situate within the province are, before or after their execution, declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces.

Now I find it difficult to see in this language anything to prevent a local legislature from authorizing a railway to be constructed and operated from any one point in the province to any other point therein, even if one or both of such points is or are on the very border.

Such a railway is not a road "connecting the province with any other province or extending beyond the limits of the province," however much the promoters may wish or intend to form such connection or extension afterwards. The latter element has nothing whatever to do with the question of the power to legislate as aforesaid. But the framers of the B. N. A. Act evidently foresaw that a provincial line, though wholly within the Province, might be made part of a system connecting two provinces or connecting a province with a foreign country; and they therefore reserved the power to the Parliament of Canada, after declaring such work to be for the general advantage of Canada or for the advantage of two or more o

## CORRESPONDENCE—OSGOODE HALL LIBRARY.

the provinces, to legislate with respect to such work, either before or after its execution.

This does not mean that such declaration of the Parliament of Canada voids the prior valid legislation of the Province respecting the work, but only that after such declaration, the provincial legislature can legislate no further respecting such work, which comes thereafter under the jurisdiction of the Dominion Parliament. Nor does it mean that the Dominion Parliament can properly legislate so as to prevent the execution, completion, or operation of any such line of railway, even after making such a declaration as aforesaid; for the declaration is that the work, not the stoppage of the work, is for the general advantage of Canada, etc., and it would be nothing but bad faith and trickery of the worst kind to make a solemn declaration of that kind and then falsify it by stopping the work.

Indeed no such action ever has been or could or would be taken by Parliament. Whenever Parliament has made such a declaration, the railway has been continued and operated under Dominion laws. The Canada Southern Railway in Ontario is a notable example of this. It was first chartered by the Ontario Legislature to run from a point on or near the Niagara River to a point on or near the Detroit River, and was evidently intended to form part of a through line connecting the States of New York and Michigan, yet the Act was not disallowed. It was clearly not considered to be *ultra vires*. The same has happened in several other instances which I cannot at present name. If, therefore, the Manitoba Legislature should charter a railway to run to the border, even though the promoters expected and intended to form a connection there with some American road, the Act would not be *ultra vires*, and its disallowance by the Dominion Government could not be put on that ground. Neither could it be put on the ground that the contract with the Canadian Pacific Railway Company requires such disallowance, for as to the old Province of Manitoba, it does not and could not require it; though the case would be different in the added territory.

This point, however, does not come within the range of my subject, which is limited to the B. N. A. Act. I might remark, however, whilst keeping strictly to my subject, that under the B. N. A. Act it would not be possible for the Dominion Parliament, even if it tried, to legislate away the right of any province conferred upon it by the B. N. A. Act. In the case of the C. P. R. Co. Parliament has not, as I say, even attempted to legislate away any of Manitoba's rights. Upon what pretext, then, has the Dominion Government repeatedly disallowed Acts of the Manitoba Legislature char-

tering railways to the border in the old Province? Simply this, that they have the power to do it under the B. N. A. Act, with or without assigning any reason; and the only reason assigned is, that such lines would be competitors with the C. P. R. and that it is for the general advantage of the Dominion to protect the C. P. R. from such competition for at least a limited period. To discuss the sufficiency of this reason, whether the Dominion Government are justified in acting on it as they have done, would be a question of politics and beyond the scope of this series of letters.

Yours, etc.,

GEORGE PATTERSON.

Winnipeg, July, 1886.

## OSGOODE HALL LIBRARY.

The following is a list of books received at the Library during the months of April, May, June and July, 1886:

- Abercrombie's Medical Jurisprudence, London, 1885.
- Austin's Farm and Game Laws, Boston, 1886.
- Archibald's Practice at Judges' Chamber, London, 1886.
- Anson on Contracts, Oxford, 1886.
- Anson's Law and Custom of the Constitution, Oxford, 1886.
- Blackstone's Contract of Sale, London, 1885.
- Brice on Patents, London, 1885.
- Blyth's Analysis Snell's Equity, London, 1885.
- Bennett's Compensation for Injuries, London.
- Best on Evidence, Boston, 1883.
- Consolidated Statutes, Canada, Ottawa, 1885.
- Champion's Digest Cases since Wine Act, London, 1885.
- Clifton on Innkeepers, London, 1885.
- Cobbett's Cases on International Law, London, 1885.
- Cavanagh's Money Securities, London, 1885.
- Castle's Law of Rating, London, 1886.
- Cooley on Taxation, Chicago, 1886.
- Daly's Reports, N. Y., Common Pleas, 12 vol New York, 1868-85.
- Decolyar on Guarantees, London, 1885.
- Dowell's Income Tax Acts, London, 1885.
- Digest of Cases—Law Reports, 1881-85, London, 1886.
- Eversley's Law of Domestic Relations, London, 1885.
- Elphinstone, N. and C. Interpretation of Deeds, London, 1885.
- Ellis' Income Tax, London, 1886.
- Ellis' House Tax, London, 1885.
- Emden's Building Contracts, etc., London, 1886.

## OSGOODE HALL LIBRARY.

- Emden's Practice in Winding up Companies, London, 1883.  
 Foster's "Men at the Bar," London, 1885.  
 Freeman on Judgments, San Francisco, 1881.  
 Geary's Law of Theatres, London, 1885.  
 Gibson and McLean's Practice, London, 1885.  
 Gniest's History English Constitution, London, 1886.  
 Howell's Annotated Statutes, Michigan, Chicago, 1882-83.  
 High on Receivers, Chicago, 1886.  
 Hastings on Torts, London, 1885.  
 Hawkins on Wills, Philadelphia, 1885.  
 Herman on Estoppel and Res Judicata, Jersey City, 1886.  
 Hilton's Reports, New York, Common Pleas Vols. 1 and 2, New York, 1859-70.  
 Hardcastle's Election Petitions, London, 1885.  
 Jones on "Torrens System," Toronto, 1886.  
 Jenkin's Public Worship, London, 1880.  
 Kellen's Digest Massachusetts Reports, Boston, 1886.  
 Knight's Model By-Laws, London, 1885.  
 Lely and Pearce's Agricultural Holdings Act, London, 1885.  
 Lushington's Admiralty Reports, London, 1864.  
 Lawrence's Deed of Arrangements, London, 1886.  
 Montreal Law Reports, Vol. 1, Montreal, 1885.  
 Martindale on Abstract of Title, St. Louis, 1885.  
 Marsden's Admiralty Cases, London, 1885.  
 Moores' Instruction to Young Solicitors, London, 1885.  
 Mushet on Trade Marks, London, 1885.  
 Macqueen's Husband and Wife, London, 1885.  
 Moore's Practical Forms, London, 1886.  
 Moore's Abstracts of Titles, London, 1886.  
 McArthur's Contract of Marine Insurance, London, 1885.  
 Nova Scotia Statutes, 5th series, Halifax, 1884.  
 Newson's Law of Salvage, London, 1886.  
 North-West Territories Ordinances, Regina, 1885.  
 Oregon Reports, Vols. 1 to 12, San Francisco, 1852-85.  
 Oldham and Foster's Law of Distress, London, 1886.  
 Ontario Statutes, 1886, Toronto, 1886.  
 Pratt's Income Tax Act, London, 1885.  
 Pollock's Essays on Jurisprudence, London, 1882.  
 Paterson on Master and Servant, London, 1885.  
 Prideaux's Precedents in Conveyancing, London, 1885.  
 Palmer's Company Precedents, London, 1884.  
 Ralston on Discharge of Contracts, Philadelphia, 1886.  
 Roscoe's Seamen and Safety at Sea, London, 1885.  
 Rowe's Parliamentary Poll Book, London, 1885.  
 Revised Statutes of Maine, Portland, 1884.  
 Rogers on Elections, London, 1885.  
 Smith's (E. D.) Reports, New York, Common Pleas, 4 vols. New York, 1855.  
 Sedgwick and Wait on Trial of Title to Land, New York, 1886.  
 Smith's Guide to Patents, London, 1886.  
 Scrutton's Roman Law, Cambridge, 1885.  
 Stephen's International Law, London, 1884.  
 Stimson's American Statutes, Boston, 1886.  
 Spear on Extradition, Albany, 1885.  
 Stephen's Commentaries (4 vols.), London, 1886.  
 Stephen's National Biography, Vol. 6, London, 1886.  
 Slater on Awards, London, 1886.  
 Story's Equity Jurisprudence, 13th edition, Boston, 1886.  
 Twistleton and Chabot, Handwriting of Junius, London, 1871.  
 Taylor's Landlord and Tenant, Boston, 1879.  
 Theobald on Wills, London, 1885.  
 Taswell Langmead's English Constitutional History, London, 1886.  
 Underhill's Modern Equity, London, 1885.  
 U. S. Digest, N. S. Vol. 16, Boston, 1886.  
 White and Tudor's Leading Cases in Equity, London, 1886.  
 Wigram's Justice's Note Book, London, 1885.  
 Winslow on Private Arrangements, London, 1885.  
 Wood on Limitations of Actions, Boston, 1883.  
 Woodfall's Landlord and Tenant, London, 1886.  
 Wilson's Judicature Act, London, 1886.

D.

## LAW SOCIETY OF UPPER CANADA.

## Law Society of Upper Canada.



OSGOODE HALL.

EASTER TERM, 1886.

During this Term the following gentlemen were called to the Bar, namely:—Messrs. George Goldwin Smith Lindsey, Arthur Eugene O'Meara, Edward Albert Holman, Alson Alexander Fisher, Edmund James Bristol, Henry James Wright, Alexander McLean, Robert George Code, Robert Alexander Dickson, Donald Macfarlane Fraser, Peter Doy Cunningham, Robert Franklin Sutherland, John Mortimer Duggan, John Graham Forgie, Thomas Hobson, Thomas Evan Griffith, William Morris, Herbert Macdonald Mowat, Joseph Mackenzie Rogers, Hugh Thomas Kelly, William James Church, Harry Hyndman Robertson, George Herbert Stephenson, Richard Armstrong, John Thacker, George Edgar Martin, William Davis Swayzie.

The following gentleman received Certificates of Fitness, namely:—Mr. T. E. Griffiths, who passed in Michaelmas Term, 1885; and Messrs. R. Armstrong, E. J. Bristol, A. E. Kennedy, E. A. Holman, A. A. Fisher, G. Wall, D. A. Givens, W. T. McMullen, N. A. Bartlett, Thomas Hobson, F. C. Powell, H. F. Jell, J. C. Mewburn, W. G. Fisher, A. W. Ford, D. C. Hossack, W. G. McDonald, W. R. Smyth, G. H. Stephenson.

The following gentlemen were admitted into the Society as Students-at-Law, namely:

*Graduates.*—John Howard Hunter, M.A., Archibald Bain McCollum, M.A., Arthur James Forward, B.A., William Henry Irving, B.A., George E. Kynaston Cross, B.A.,

*Matriculants of Universities.*—William James Fleury.

*Junior Class.*—William Hardy Murray, D'Arcy Fenton, Norman MacKenzie, William John Glover, William Senkler Buell, Arthur Herve Selwyn Marks, David Mackenzie, Thomas Joseph Murphy, Newton Wesley Rowell, James William McColl, Alexander Grant McLean, Herbert Lavallin Puxley, Percy Allan Malcolmson, Robert Burnham Revell, Robert Moore Noble, Robert Alexander Montgomery, James Albert McMullen, William Alexander Sutherland.

The following graduates were admitted on 29th June, their admission to date as of first day of Term, under new Rule 29, namely:—William

Gregor Bain, Thomas Walter Ross McRae, Donald Murdoch Robertson, Gordon James Smith, Francis Pedley, Charles Swaling, Samuel Hugo Bradford, Hume Blake Cronyn, Horace Harvey, Alexander McLean Macdonnell, Dugald James MacMurchy, Francis James Roche, Thomas Alfred Rowan, Roland William Smith.

## SUBJECTS FOR EXAMINATIONS.

*Articled Clerks.*

- 1884 and 1885. { Arithmetic.  
Euclid, Bb. I., II., and III.  
English Grammar and Composition.  
English History—Queen Anne to George III.  
Modern Geography—North America and Europe.  
Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

*Students-at-Law.*

1884. { Cicero, Cato Major.  
Virgil, Æneid, B. V., vv. 1-361.  
Ovid, Fasti, B. I., vv. 1-300.  
Xenophon, Anabasis, B. II.  
Homer, Iliad, B. IV.
1885. { Xenophon, Anabasis, B. V.  
Homer, Iliad, B. IV.  
Cicero, Cato Major.  
Virgil, Æneid, B. I., vv. 1-304.  
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

## ENGLISH.

A Paper on English Grammar.  
Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY

English History from William III. to George III inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography Greece, Italy and Asia Minor. Modern Geography North America and Europe.

Optional subjects instead of Greek:

## FRENCH.

A paper on Grammar,

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechese, Lazare Hoche.

## LAW SOCIETY OF UPPER CANADA.

## OF NATURAL PHILOSOPHY.

Books—Arnot's elements of Physics, and Somerville's Physical Geography.

*First Intermediate.*

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario amending Acts.

Three scholarships can be competed for in connection with this intermediate.

*Second Intermediate.*

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

*For Certificate of Fitness.*

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law, Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

*For Call.*

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission to the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchor, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six

## LAW SOCIETY OF UPPER CANADA.

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchers, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## F E E S .

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

## PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890.

*Students-at-law.*

## CLASSICS.

1886.	Cicero, Cato Major.
	Virgil, Æneid, B. I., vv. 1-304.
	Cæsar, Bellum Britannicum.
	Xenophon, Anabasis, B. V.
1887.	Homer, Iliad, B. VI.
	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. VI.
	Cicero, In Catilinam, I.
1888.	Virgil, Æneid, B. I.
	Cæsar, Bellum Britannicum.
	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. IV.
1889.	Cæsar, B. G. I. (vv. 1-33.)
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. I.
	Xenophon, Anabasis, B. II.
1890.	Homer, Iliad, B. VI.
	Cicero, In Catilinam, II.
	Virgil, Æneid, B. V.
	Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

## MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

## ENGLISH.

A Paper on English Grammar.

Composition.

Critical reading of a Selected Poem:—

1886—Coleridge, Ancient Mariner and Christabel.

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

## HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe. Optional Subjects instead of Greek:—

## FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886

1888 } Souvestre, Un Philosophe sous le toits.

1890

1887 } Lamartine, Christophe Colomb.

1889

## OR, NATURAL PHILOSOPHY.

Books—Arnot's Elements of Physics; or Peck's Ganot's Popular, Physics, and Somerville's Physical Geography.

## ARTICLED CLERKS.

Cicero, Cato Major; or, Virgil, Æneid, B. I., vv. 1-304, in the year 1886; and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, or Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe. Elements of Book-Keeping.

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.

# Canada Law Journal.

VOL. XXII.

OCTOBER 1, 1886.

No. 17.

## DIARY FOR OCTOBER.

1. Fri.....William D. Powell, 5th C.J. of Q. B. 1816.
2. Sun.....15th Sunday after Trinity.
3. Mon.....C. C. term and sittings for trial of non-jury cases begin (except in York).
4. Thur.....Henry Alcock, 3rd C.J. of Q. B. 1802.
5. Fri.....R. A. Harrison, 11th C.J. of Q. B. 1875.
6. Sat.....C. C. term (except in York) ends.
7. Sun.....16th Sunday after Trinity.
8. Mon.....C. C. York term begins.
9. Wed.....Battle of Queenston 1812. Lord Chancellor Lyndhurst died 1863, æt. 92.

TORONTO, OCTOBER 1, 1886.

THE word *West* seems to be almost synonymous with freedom from old-time traditions, and emancipation from what are generally supposed to be useless forms and ceremonies. The jurisdiction of Judge Lynch, the type of rough and ready justice, has gradually followed the setting sun, and so the traveller to the Far West scarcely expects to find at the jumping-off place on the extreme western limit of the continent the Bench and Bar adorned with the horse-hair wigs we were once familiar with at Westminster Hall. Judging from some of the sights between Toronto and Victoria, scalp-locks might be suggested as more in keeping with the environment, unless indeed it were thought desirable for the Judges and the Bar of the Supreme Court of British Columbia to wear wigs in view of the story told of an officer, whose bloodless scalp, in the shape of a wig, once remained in the grasp of a terror-stricken brave, who never raised a scalp with so much ease before.

The matter before the Supreme Court at Victoria when we happened there last month and had the honour of seeing the wigs, was the appeal from the judgment

of Chief Justice Begbie in the case of *Edmonds v. Canadian Pacific R. W. Co.*, in the which the learned Chief had granted an injunction restraining the Company from extending their line from Port Moody to the City of Vancouver. This judgment was upheld by the majority of the court (Crease and McCreight, JJ.) against the dissenting opinion of Mr. Justice Gray. We confess that we failed to follow the latter in his reasoning. The law of the case certainly has nothing to do with what, if anything, is due to such an energetic and patriotic corporation as the C.P.R., which he apparently thought ought to be encouraged, rather than damped, in their pursuit of the setting sun. The judgment delivered by Mr. Justice Crease, on behalf of himself and Mr. Justice McCreight, took up and followed in a clear and sensible manner what seems to be the plain meaning of the statute, and from the result, which the majority of the court arrived at, there would seem to be no escape. Of course it is only a question of time with the Company in getting to Vancouver, as we presume the Legislature would soon cut the Gordian knot, and nobody be the worse, except a few land speculators who own pieces of rock at Port Moody.

WHILE the Commissioners for the Consolidation of the Statutes are revising the Real Property Acts, we think there are one or two matters deserving of their attention, and which they might fittingly recommend to the legislature as proper subjects for amendment.

The first is the making of estates tail liable for the debts of the tenant in tail. This was accomplished in England by



## SOME NECESSARY AMENDMENTS—COMMON CARRIERS IN ONTARIO.

1 & 2 Vict. c. 110, ss. 11, 13, 18, 19; but this legislation appears not to have been adopted in this Province. Estates tail are exempted (unwisely, we think,) from the recent statute which provides for land passing on the death of the owner to his personal representative. If the public were generally to learn that by entailing their real estates they could also protect them from liability to creditors, it is possible that an unwholesome impetus might be given to the creation of estates tail, a species of tenure which the tendency of modern ideas is in favour of abolishing, rather than surrounding with exceptional privileges.

The facilities which the legislature has already placed within the power of the tenant in tail of barring the entail and converting the estate into a fee simple, have practically made him the owner in fee, with this extraordinary exception, that although he himself has complete dominion over the estate in all cases as against the issue in tail, and even against remaindermen where there is no protector of the settlement, yet so far as his creditors are concerned, they can only sell an estate for his life in the land entailed. For all practical purposes of ownership his rights are absolute and unconditional, but when his creditors come to realize their debts against him he is entitled to say: You can only sell my life estate. We have no hesitation in saying that the amendment of the law should be made if the estate tail is to be continued at all. It would be far better to abolish this species of estate altogether by declaring that every tenant in tail shall be *in esse* what he is already *in posse*, viz.: the owner of the fee.

The next point to which we would crave the attention of the commissioners is the advisability of recommending the abolition of the right to consolidate mortgages. This right is a creation of equity, and one

that has not infrequently been a source of practical injustice. In England the right has been abolished by 44 & 45 Vict. c. 41, s. 17.

One other suggestion we have to make, and it is this, that the R. S. O. c. 106, s. 36, which provides that on the death of a deceased mortgagor his mortgage debts shall primarily be chargeable on the mortgaged lands, should, as in England under 40 & 41 Vict. c. 34, be made applicable to mortgages of leaseholds, and to liens for unpaid purchase money due on land purchased by the deceased.

Owing to the change which has recently been made in the law of descent, this amendment may not be of quite so much importance as it would formerly have been; at the same time, even now it is necessary in order properly to adjust the rights of specific devisees of the incumbered property, and those who take the undisposed of residue.

## COMMON CARRIERS IN ONTARIO.

(Continued from p. 297).

THE extent to which carriers may lawfully limit their liability for negligence was exhaustively ventilated in the English courts shortly before the argument of *Hamilton v. The G. T. R.* here.

The English case was *Peek v. The North Staffordshire Ry. Co.* (10 H. L. 473); and although the issue there arose on a construction of the Railway and Canal Traffic Act, it was found necessary to examine the history of common carriers from its common law origin onwards.

This case was not referred to in the argument of *Hamilton v. The G. T. R.* It is mentioned in the judgment of Draper, C.J., but no extracts are made from it.

Mr. Justice Blackburn, in giving his opinion to the House, at p. 493, says:—

“Mr. Justice Story, in his Commentaries

## COMMON CARRIERS IN ONTARIO.

on the Law of Bailments, section 549 (published in 1832 after the Carriers Act, but in America, where that Act had no effect), states, as I think, accurately, what was the effect of the decisions up to that time. 'It was,' says he, 'formerly a question of much doubt how far common carriers on land could, by contract, limit their responsibility, upon the ground that, exercising a public employment, they are bound to carry for a reasonable compensation, and had no right to change their common law rights and duties. And it was said that, like innkeepers, they were bound to receive and accommodate all persons, as far as they may, and could not insist upon special and qualified terms. The right, however, of making such qualified acceptances by common carriers seems to have been asserted in early times. Lord Coke declared it in a note, *Southcot's Case* (4 Co. Rep. 84), and it was admitted in *Morse v. Slue* (1 Vent. 238). It is now recognized and settled beyond any reasonable doubt.' So far the passage is cited and adopted in the judgment of the Court of C. P. in *Austin v. Manchester, etc., Ry. Co.* (10 C. B. 473), a case decided in 1850, to which I shall hereafter have to call attention; and so far I think this, according to the decisions subsequent to 1832, still remained law in 1854, when the Railway and Canal Traffic Act was passed. But Mr. Justice Story proceeds to say, 'Still, however, it is to be understood that common carriers cannot by any special agreement exempt themselves from all responsibility, so as to evade altogether the salutary policy of the common law. They cannot, therefore, by a special notice, exempt themselves from all responsibility in case of gross negligence and fraud, or, by demanding an exorbitant price, compel the owners of the goods to yield to unjust and oppressive limitations of their rights. And the carrier will be equally liable in case of the fraud or misconduct of his servants as he would be in case of his own personal fraud or misconduct.' In my opinion the weight of authority was, in 1832, in favour of this view of the law, but the cases decided in our courts between 1832 and 1854 established that this was not law, and that a carrier might, by a special notice, make a contract limiting his responsibility even in the cases here men-

tioned of gross negligence, misconduct or fraud on the part of his servants; and, as it seems to me, the reason why the legislature intervened in the Railway and Canal Traffic Act, 1854, was because it thought that the companies took advantage of those decisions (in Story's language) 'to evade altogether the salutary policy of the common law.'

Lord Wensleydale, in pronouncing his judgment, at p. 574, says:—

"Mr. Justice Blackburn, in his very able and clear opinion has fully stated and explained most of the various decisions which have taken place as to the liability of carriers. . . . Numerous subsequent cases between the years 1832 and 1854 established that a carrier might make a contract limiting his responsibility, even in cases of gross negligence or misconduct. At length, such having become frequent, it was suggested in the case of *Carr v. The Lancashire, etc.* (7 Ex. 707), that the legislature . . . might . . . put a stop to this mode which the carriers had adopted to limit their liability. The legislature apparently answered that appeal by passing the Railway and Canal Traffic Act, 1854."

It is to be noted that the opinion given by Mr. Justice Blackburn was adopted by the House, and it displays a very careful search through all previous decisions upon the subject. The extract from Story is all the more valuable as being an accepted authority contemporaneous with the passing of the Carriers Act.

How far the opinions of these two eminent judges are supported by authority may be seen in the following cases. And, first I will refer to those which are mentioned in the Canadian decision.

In *Lyon v. Mells*, 5 East 428, decided in 1804, the notice relied upon by the defendant was "that he would not be answerable for any damage unless occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay £10 per cent. upon such damage, so as the whole did not exceed the value of the vessel and freight;" and it was held that a loss happening by the personal default of the

## COMMON CARRIERS IN ONTARIO.

carrier himself was not within the scope of such notice. Judgment was accordingly given for the plaintiff. Lord Ellenborough, in delivering judgment, said :—

"It is impossible, without outraging common sense, so to construe the notice as to make the owners of vessels say, 'We will be answerable to the extent of 10 per cent. for any loss occasioned by the want of care of the master or crew; but we will not be answerable at all for any loss occasioned by our own misconduct, be it ever so gross and injurious.'"

*Garnet v. Willan*, 5 B. & Ald. 53, decided in 1821, was also referred to. There the defendants had given notice that they would not be responsible for any package containing specified articles, or which, with its contents, should exceed £5 in value, if lost or damaged, unless an insurance were paid; and it was held that notwithstanding this notice, the carriers were responsible for the parcel in question, in consequence of their having delivered it to be carried by another coach, of which one of the carriers only was proprietor.

*Wyld v. Pickford*, 8 M. & W. 443, decided in 1841, was also referred to. The following extract from the lengthy head-note will indicate how far it stops short of deciding, even under the Carriers Act, that a carrier can contract himself out of all liability :—

"A carrier is not bound to convey goods except on payment of the full price for the carriage according to their value; and if that be not paid it is competent to him to limit his liability by special contract. And, therefore, where a carrier receives valuable goods to carry, after notice to the bailor that he will not be responsible for loss or damage to them unless a higher than the ordinary rate of insurance be paid for the carriage, he receives them on the terms of such notice, which amounts to a special contract. But he is not exempted thereby from all responsibility; but is, notwithstanding the notice, bound to take ordinary care in the carriage of the goods, and is liable, not only for any act which amounts to a total abandonment of his character of a carrier,

or for wilful negligence; but also for a conversion by a misdelivery arising from inadvertence or mistake, if such inadvertence or mistake might have been avoided by the exercise of ordinary care."

In delivering judgment Parke, B., said :—

"We agree that if the notice furnishes a defence, it must be either on the ground of fraud or of a limitation of liability by contract, which limitation it is competent for a carrier to make, because, being entitled by common law to insist on the full price of carriage being paid beforehand, he may, if such price be not paid, refuse to carry upon the terms imposed by the common law and insist upon his own; and if the proprietor of the goods still chooses that they should be carried, it must be on those terms; and probably the effect of such a contract would be only to exclude certain losses, leaving the carrier liable *as upon the custom of England* for the remainder."

*Austin v. Manchester*, 10 C. B. 454, was also referred to. This case was decided in 1850, at a time when the conditions imposed by carriers in England were becoming almost intolerable, and yet were held to be valid under the Carriers Act. But the following quotation from Mr. Justice Cresswell's judgment shows that even then the carriers did not claim immunity for wilful damage done by themselves or their servants. He says, at p. 475 :—

"The question, therefore, still turns upon the contract, which, in express terms, exempts the company from responsibility for damages, however caused, to horses, etc. In the largest sense those words might exonerate the company from responsibility even for damage done wilfully—a sense in which it was not contended that they were used in this contract."

The next case referred to was *Morville v. G. N. Ry.*, 16 Jur. 528, decided in 1852. It was very similar to the last mentioned. The only other cases which appear to have been at all relied upon in the judgment of *Hamilton v. The G. T. R.* were *Carr v. Lancashire*, 7 Ex. 707, cited *supra*,

## COMMON CARRIERS IN ONTARIO.

and *McManus v. Lancashire*, 4 H. & N. 327, but as these were decisions under the Railway and Canal Traffic Act, they cannot support a case in our courts.

There were, however, many other cases which might have been referred to, and among them were the following:

(a) *Ellis v. Turner*, 8 T. R. 531, decided in 1800, was an action against ship owners for damages for loss of goods, occasioned by the accidental sinking of the vessel in the river Trent; and it was held that the defendants were liable for the full amount of the loss, notwithstanding their notice that they would not be answerable for losses in any case, except the loss were occasioned by the want of care in the master, nor even in such case beyond 10 per cent., unless extra freight were paid. No extra freight was paid. The negligence complained of consisted in carrying the goods past the point where they should have been landed.

(b) *Beck v. Evans*, 16 East 244, decided in 1812. The defendants had given notice that they would not be answerable for cash, bank notes, jewels, etc., or any other goods of what nature or kind soever, above the value of £5, if lost, stolen or damaged, unless a special agreement was made, and an adequate premium paid over and above the common carriage. The plaintiff delivered a cask of brandy valued at £70 to defendants for carriage, and paid 1s. 6d. at the time for booking, which was the common charge independent of the carriage price. No special agreement was made.

Lord Ellenborough said (p. 247):—

"But upon the other point, I think the carrier does not stipulate for exemption from the consequence of his own misfeasance; and if goods are confided to him, and it is proved that he has mis-conducted himself in not performing a duty which by his servant he was bound to perform, that is such a misfeasance as, if the goods thereby become damaged, his notice will not protect him from."

(c) *Bodenham v. Bennett*, 4 Price 31, decided in 1817. There the defendants were proprietors of a coach, and had given the usual notice that they would not be liable for parcels above £5, unless insured and paid for accordingly. The plaintiff's clerk took a parcel, containing notes to the amount of £347 11s., to the coach office to go by the coach to Brecon. He paid a halfpenny for carriage and booking. No insurance was demanded or paid. On the following morning the parcel was entered in the way bill and put in the back seat of the coach. The coachman on that day was intoxicated, but not so as to be unable to attend to his business. The parcel was lost. The jury found for the plaintiff.

Wood, B., said at p. 34:—

"I see no ground to disturb the verdict. By the common law, the carrier was liable for losses arising from accident or robbery; nay, from irresistible force. The case of *Morse v. Slue* (1 Vent. 238), pressed extremely hard on common carriers. Then special conditions were introduced, for the purpose of protecting carriers from extraordinary events; but they were not meant to exempt them from due and ordinary care. It cannot be supposed that people would entrust their goods to carriers on such terms. It only means, that they will not be answerable for extraordinary events; but we need not in this case lay down that rule.

"Here has been gross negligence, and in all cases of that sort carriers are liable."

(d) *Smith v. Horne*, 8 Taunt. 144, decided in 1818. This was an action of *assumpsit* against a carrier. And it was held that gross neglect will defeat the usual notice given by carriers for the purpose of limiting their responsibility.

Park, J., in delivering judgment, said:

"The doctrine of carriers exempting themselves from liability by notice has been carried much too far."

Burrough, J., said:—

"The doctrine of notice was never known until the case of *Forward v. Pittard*, (1 T. R. 27), which I argued many years ago. Notice does not constitute a special

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contract; if it did, it must be shown upon the record; it only arises in defence of the carrier; and here it is rebutted by proof of positive negligence. I lament that the doctrine of notice was ever introduced into Westminster Hall."

(e) *Forward v. Pittard* was decided in 1785, and it was there held that a carrier who undertakes for hire to carry goods is bound to deliver them at all events, except damaged or destroyed by the act of God or the king's enemies.

(f) *Sleat v. Fagg*, 5 B. & Ald. 342, decided in 1822.

The head-note of this case is as follows:

"A parcel containing country bankers' notes, of the value of £1,300, and addressed to their clerk, in order to conceal the nature of its contents, was delivered to the carrier, without any notice of its value, to be carried by a mail coach, and was accepted by him to be so carried. The parcel was sent by a different coach, and was lost. The carriers had previously given notice that they would not be answerable for any parcel above £5 in value, if lost or damaged, unless an insurance were paid. No insurance having been paid in this case,

"Held, notwithstanding that the carrier was responsible for the loss."

Holroyd, J., said (p. 349):—

"The question is whether the carrier is protected from the loss in question by the terms of his notice. I think that in cases of misfeasance a carrier is not thereby exempted from loss. This is clearly a case of misfeasance.

(g) *Riley v. Horne*, 5 Bing. 217, decided as it was in 1828, must have been one of the latest cases occurring before the passing of the Carriers Act, and the publication of Mr. Justice Story's work on Bailments. It is all the more interesting, as it was the result of long deliberation, and it contains a *resumé* of the law on the point under discussion.

The defendants were the owners of a coach running from London to Kettering and back daily. They had advertised the usual notice at the London office; but the question was whether the notice ap-

plied to a parcel sent from Kettering to London.

In delivering the judgment of the court, Best, C.J., at p. 224, said:

"We have established these points,—that a carrier is an insurer of the goods which he carries; that he is obliged for a reasonable reward to carry any goods to the place to which he professes to carry goods that are offered him, if his carriage will hold them, and he is informed of their quality and value; that he is not obliged to take a package, the owner of which will not inform him what are its contents, and of what value they are; that if he does not ask for this information, or if, when he asks and is not answered, he takes the goods, he is answerable for their amount, whatever that may be; that he may limit his responsibility as an insurer by notice; but that a notice will not protect him against the consequences of a loss by gross negligence."

Let us now see how this question has been dealt with in the United States, where the law was similar to our own in 1830, and where, except in a few States, no changes have been made by statute.

The latest work upon the subject, so far as I am aware, is Wood's *Railway Law*, 1885, and the following quotation, amply verified by authorities, seems to entirely support the view I have taken. In section 425 the author says:—

"In addition to the exemption from liability referred to in the last section" (*i.e.*, from losses arising from the act of God, public enemies, the fault of the party, or the inherent qualities of the property itself) "a carrier may, by express contract, limit his liability, provided the limitation is just and reasonable. But the limitation must be imposed by express contract, and as a rule cannot be imposed by a mere general notice—at least unless actual knowledge of the terms of such notice is brought home to the shipper at the time he enters into the contract, the burden of establishing which is upon the carrier. But in most of the States, while the carrier may by special contract limit his liabilities as an insurer—as, for the loss of the goods by fire and other casualties which are not

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the result of his negligence—yet he cannot restrict it so as to excuse himself from loss or damage resulting from the negligence of his servants or agents."

In support of the same principles reference may be made to the following cases, taken from Redfield's Leading American Railway Cases (1872), in volume 2 at pp. 47 and 247: *Judson v. The Western*, 6 Allen 486, and *Hooper v. Wells*, 5 Am. L. Reg. N.S. 16.

It may be said, however, that there was no reason why carriers in this country should not go on reducing their common law liability without the aid of a Carriers Act, and that *Hamilton v. G. T. R.* may be supported on this ground. The answer to this is twofold:

First, the learned judges did not so regard it; for their language shows that they did not suppose they were extending or sanctioning an extension of the powers of carriers in any way. On the contrary they arrived at their decision very unwillingly, and expressed regret that they found the law as they did.

Second, the legislature did not so regard it; for if such an encroachment upon the common law had been requisite to protect carriers, the sweeping provisions of the Railway Acts on this point would have been unjustifiable.

The object of the legislature in prohibiting railway companies from setting up notices, conditions or declarations in cases of negligence, may have been to alter the law as interpreted in *Hamilton v. The G. T. R.* and subsequent cases, or it may have been to declare the law, as opposed to those decisions. It must be confessed that the language used in the Railway Act does not read like a declaratory enactment. On the other hand, the language used in the Act Respecting Carriers by Water (37 Vict., cap. 25) strongly supports the declaratory hypothesis. The first section of

this Act defines the liabilities and rights of carriers by water, and places them in very much the same position as that of carriers in England prior to the passing of the Carriers Act. It provides amongst other things that carriers by water "shall be liable for the loss of or damage to goods entrusted to them for conveyance be aforesaid, except that they shall not be liable to any extent whatever to make good any loss or damage *happening without their actual fault or privity, or the fault or neglect of their agents, servants, or employees*, (1) to any goods," etc., etc. (enumerating the exceptions).

If the fact that the Carriers Act has never had any application in Ontario, and therefore that decisions under it are inapplicable here, had not been almost entirely lost sight of, the following expression of opinion could scarcely have fallen from the late Chief Justice Moss in *Fitzgerald v. The G. T. R.*, 4 App., at p. 618:

"It thus appears to me that as the law applicable to this case is the same as governed the English Courts before the passing of the Railway and Canal Traffic Act, 1854, there is an overwhelming body of authority to show that the carrier may, by conditions aptly framed, protect himself against the consequences of negligence."

The decision in *Hamilton v. The G. T. R.* was directly followed in *Spettigue v. The G. W. R.*, 15 C. P. 315, and *Bates v. The G. W. R.*, 24 U. C. R. 544, where the necessity of legislative redress was remarked on by the judges. Then began the course of legislation which formed the subject of so much discussion in *Vogel v. The G. T. R.*, 10 App. 162 (recently affirmed by the Supreme Court). How strenuously, and for a time successfully, this legislation was resisted by the railways may be seen in *Scott v. The G. W. R.*, 23 C. P. 182, and *Allan v. The G. T. R.*, 33 U. C. R., 483.

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carriers, the decision in Vogel's case would seem to have finally settled the question, and the above inquiry would be interesting only as a matter of history. There are, however, many classes of carriers, unaffected by the provisions of the Railway Acts; and possibly the question of *their* liability for negligence may, on some future occasion, necessitate a review of the case which I have above attempted to analyse.

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The *Law Reports* for August include 17 Q. B. D., pp. 309-413; 11 P. D., pp. 73-119; 32 Chy. D., pp. 397-524; and 11 App. Cas., pp. 229-415.

## CONFLICT OF LAWS—ASSIGNMENT OF CHOSE IN ACTION.

Taking up the cases in the Queen's Bench Division, the first to be noted is *Lee v. Abdy*, 17 Q. B. D. 309, which was an action against an English Company upon a policy of life insurance, which had been assigned to the plaintiff by her husband, who at the time of the assignment and until his death was domiciled at Cape Colony, by the laws of which colony the assignment was invalid by reason of the assignee being the assignor's wife. The court (Day and Wills, JJ.), held that the assignment was governed by the law of Cape Colony, and therefore that the plaintiff was not entitled to recover. Day, J., at p. 312, says:

The subject-matter of the assignment is a chose in action which has no locality. The general rule, subject to exceptions which do not seem to me to apply to the present case, is that the validity and incidents of a contract must be determined by the law of the place where it is entered into. The assignment here in question is an assignment that exists, if at all, by virtue of a contract between assignor and assignee, and I cannot see how, if there was no valid contract between them, there can be any valid assignment.

Wills, J., confessed that he felt some doubts with regard to the case, owing to the difficulty in deducing the principle from the authorities cited; but if there were no authorities he thought the rational view was that "this assignment being invalid according to the law

of the country where it was made, and where the parties to it were domiciled, it must be treated as invalid here."

MARINE INSURANCE—RISK OF CRAFT TILL GOODS LANDED  
—TRANSHIPMENT TO LIGHTERS FOR RESHIPMENT.

*Houlder v. Merchants' Marine Insurance Co.*, 17 Q. B. D. 354, is a decision of the Court of Appeal affirming the judgment of Field, J. The action was brought on a policy of marine insurance, which insured the plaintiff against "all risk of craft until the goods are discharged and safely landed." The goods in question arrived at their destination, and instead of being landed, were then transferred to lighters with a view to their reshipment for exportation; while on the lighters awaiting reshipment they were lost. The Court of Appeal held that the loss was not covered by the policy. Bowen, L.J., who delivered the judgment of the court, says, at p. 356:

Cargo discharged upon lighters for transhipment to an export vessel is accordingly exposed to a peril which is not the same as that which it encounters if discharged upon lighters to take it to the shore at once. It is perfectly true that by taking delivery short of the shore the consignee determines the risk insured. But this is not because in such a case the risk is terminated by an actual landing, but because the consignee waives the landing, and himself terminates the risk instead, by taking delivery short of the land. Nobody, in commercial or business language, can say that goods are landed which are transhipped without landing, or that goods which are placed in lighters for transhipment are placed in lighters to be landed.

## CRIMINAL LAW—BLOW AIMED AT ONE PERSON ACCIDENTALLY WOUNDING ANOTHER.

In the *Queen v. Latimer*, 17 Q. B. D. 359, the question submitted to the court was whether when the prisoner, in unlawfully striking at a man, accidentally struck and wounded a woman beside him, could be convicted of unlawfully and maliciously wounding the woman, and the court (Lord Coleridge, C.J., Lord Esher, M.R., Bowen, L.J., and Field and Manisty, JJ.) held that he could, and affirmed the conviction.

## TRIAL WITH JURY—DISCRETION OF JUDGE AS TO COSTS.

The case of *Huxley v. West London Extension R. W. Co.*, 17 Q. B. D. 373, is chiefly remarkable for the extraordinary character of the judgment of Lord Coleridge, which is nothing less than a somewhat hot-tempered counterblast against the recent decisions of the Court of Appeal, *Re Jones v. Curling*, 13 Q. B. D. 262, wherein it claimed the right to review the

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discretion of a judge who had deprived a successful party of costs, on the ground that the existence of "good cause," upon which the right to exercise the discretion depends, is a question of fact. This Lord Coleridge conceives to be a mischievous interference with the discretion of the judges of first instance, and instead of its being a question of fact, and therefore appealable, he considers it to be a mere question of opinion. We venture to doubt the propriety of an inferior tribunal undertaking to criticise the decisions of a superior court at all, and certainly we do not think Lord Coleridge has set a very praiseworthy example in either the manner or temper in which his criticisms are couched. How would Lord Coleridge like to see the judgments of his own court criticised in a similar strain by, say, a Judge of a County Court? Would the spectacle be edifying, or for the public good? What seems to have roused the ire of the Chief Justice was the fact that one of the judges in appeal had said that "the proper order for the Court of Appeal to make is to allow the Chief Justice, with the expression of their opinion, to exercise his discretion as to the costs of the action." "Such language," he says, "speaks for itself; nor is it, perhaps, worth the time it has taken to mention it."

WILL—REVOCATION—OBLITERATION OF CODICIL—R. S. O.  
c. 108, s. 22.

Turning now to the cases in Probate Division, the first case we think it necessary to notice is *In re Gosling*, 11 P. D. 79. In this case the testator had obliterated the whole of a codicil, including his signature, by thick black marks, and at the foot of it had written the words signed by himself and two witnesses: "We are witnesses of the erasure of the above," and it was held that this constituted a valid revocation of the codicil, and that the words above mentioned were "a writing declaring an intention to revoke."

## WILL—ATTESTATION.

In *Re Leverington*, 11 P. D. 80, a will was pronounced which was attested by two witnesses, but one of the witnesses had, at the testator's request, signed her husband's name instead of her own, the husband not being present. It was held that the attestation was invalid, and probate was refused.

## WILL—UNDUE INFLUENCE.

In *Wingrove v. Wingrove*, 11 P. D. 81, Sir James Hannen laid down the law that to establish undue influence sufficient to invalidate a will, it must be shown that the will of the testator was coerced into doing that which he did not desire to do; and the mere fact that in making his will he was influenced by immoral considerations does not amount to such undue influence so long as the dispositions of the will express the wish of the testator.

DEVISE OF INCUMBERED AND UNINCUMBERED ESTATES—  
TENANT FOR LIFE—INTEREST—REPAIRS.

Turning now to the reports in the Chancery Division, we think *In re Hotchkys, Freeke v. Calmady*, 32 Chy. D. 408, deserving of a brief notice. A testatrix devised to trustees "all my real and personal estate upon trust, at their discretion to sell such parts thereof as shall not consist of money," and out of the proceeds to pay her debts, etc., and invest the residue; and further provided that the trustees should "stand possessed of such real and personal estate, moneys and securities," upon trust to pay the rents, interest, dividends and annual produce thereof, to T. during her life, with a clause of forfeiture on alienation, and after the death of T. she gave her "real and personal, and the securities" in which the same might be invested to V. C. absolutely. At the death of the testatrix she was entitled to the P. estate, which was unincumbered. Some time after her death a remainder in fee to which she was entitled in the B. estate, which was subject to mortgages made by prior owners, fell into possession. This estate was out of repair, and the income, though sufficient to pay the interest on the mortgages, was inadequate to make the repairs. The Court of Appeal held that the will did not create a trust for conversion, but only gave the trustees a power of sale; that the trustees had no power to apply the rents of the P. estate in making repairs on the B. estate, to the prejudice of the tenant for life, though the court if applied to would sanction the doing of such repairs as were expedient, on terms which would be equitable as between the tenant for life and the remainderman. The court further held (in this respect reversing Bacon, V.C.) that the tenant for life was not at liberty to accept the devise of the P. estate and refuse the other.



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## INJUNCTION OBTAINED BY MISREPRESENTATION.

The only point for which we think it needful to refer to in *Wimbledon v. Croydon*, 32 Chy. D. 42, is the decision of North, J., that it is proper to move to discharge an *ex parte* injunction on the ground of its having been obtained by misrepresentation, and for a reference as to damages, notwithstanding the injunction is about to expire. He says, at p. 41:

It seems to me here that the order is one which ought not to have been obtained for the reasons I have given, and that under those circumstances, inasmuch as it obvious from the affidavits that some damage has been sustained by the defendants, they would be entitled to apply for and are entitled now to have, a reference to inquire what the damage is, and therefore the motion for that purpose would be proper in any case.

## MORTGAGE OF REALTY AND PERSONALTY—REDEMPTION.

In *Hall v. Heward*, 32 Chy. D. 430, real and personal estate having been mortgaged together, the mortgagee died leaving a will of personal estate but intestate as to realty. It was unknown who was his heir-at-law, and the mortgagee entered into possession. The executrix then brought the action to redeem both the real and personal estate, which was resisted by the mortgagee on the ground that she was only entitled to redeem the personalty on payment of a proportionate part of the mortgage debt, but Bacon, V.C., held she was entitled to redeem both estates, and that on redemption by her the defendant should convey both properties to the plaintiff, subject to such equity of redemption as might be subsisting therein in any other person or persons. From this judgment the defendant appealed, but the Court of Appeal held that it was right, and that as the owner of the equity of redemption of one of two estates mortgaged could not have insisted on redeeming that estate separately, so neither could he be compelled to redeem it separately, his right being to redeem the whole, subject to the equities of the other person interested. It was also held that though the heir-at-law ought to have been a party, yet that the court should not delay making a decree until he was ascertained and added; and further, that though a mortgagee in possession, who voluntarily transfers his security, is liable to account for the subsequent rents, yet this is not the case when the transfer is made pursuant to the order of the court.

## BILL OF EXCHANGE DRAWN AGAINST FIRM—ACCEPTANCE BY ONE OF PARTNERS—JOINT OR SEPARATE LIABILITY—ADMINISTRATION.

In *re Barnard, Edwards v. Barnard*, 32 Chy. D. 447, was an application for an administration order, which was refused under the following circumstances: A bill of exchange had been drawn on a firm; B., one of the partners, accepted the bill, signing the firm's name, and adding his own underneath. B. died, and the holder of the bill, claiming to be a creditor, applied for the administration of his estate. It was proved that B.'s estate was insufficient for the payment of his separate debts. Bacon, V.C., made the usual administration order; but, on appeal, the Court of Appeal held that the acceptance of the bill was the acceptance of the firm, and that the addition of B.'s name did not make him separately liable, and as it was clear no part of his estate would be available for payment of the partnership debts, the order was discharged, and the application refused.

## VENDORS AND PURCHASERS ACT—RETURN OF DEPOSIT—COSTS.

In *Re Hargreaves v. Thompson*, 32 Chy. D. 454, the Court of Appeal decided that u. on an application under the Vendors and Purchasers Act, where the vendor fails to make out a title, the court may order him to return the purchasers' deposit, with interest, and order him to pay the purchasers' costs of investigating the title, in this respect affirming what was done by Hall, V.C., with some doubt as to his jurisdiction, in *Re Higgins & Hitchman*, 21 Chy. D. 95, and Pearson, J., in *Yielding & Westbrook*, 31 Chy. D. 344.

## MORTGAGE—FORECLOSURE—STOP ORDER—PLAINTIFFS FIRST AND LAST MORTGAGE—COSTS.

Several points were determined in *Mutual Life Assurance Co. v. Langley*, 32 Chy. D. 460. In the first place, the Court of Appeal (affirming Pearson, J.) held that where a mortgage is made of two funds, one of which is in court, and the other in the hands of trustees, the assignee must, in order to complete his title, obtain a stop order as to the fund in court, and, as regards the fund in the hands of trustees, must give the trustees notice of his assignment; and an encumbrancer on a fund in court, who obtains a stop order, is entitled to priority over a prior encumbrancer who does not obtain a stop order, and

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of whose encumbrance the subsequent encumbrancer had no notice when he took his security, although he may have had notice thereof prior to obtaining his stop order. The Court of Appeal, moreover, held (in this respect reversing Pearson, J.,) that where there are two funds mortgaged to A., and subsequently one of the funds is mortgaged to B., B. is entitled to redeem both funds, although his mortgage included only one; and, further, that where A., the first mortgagee of both funds, took subsequent incumbrances on one of the funds, and B. took subsequent incumbrances on the other, such incumbrances must be redeemed in the order of date, and one of A.'s (the plaintiff) being last in date, and he being thus in the position of first and last mortgagee, if he did not redeem, he must pay the costs of the suit.

## COMPANY—WINDING UP—STATING QUASI-CRIMINAL PROCEEDINGS AGAINST COMPANY—45 VICT. C. 23, S. 20 (D).

In *Re Briton, Medical and General Life Assurance Association*, 32 Chy. D. 503, a petition was presented for winding up the company; but before any order was made, summonses were taken out at a police court by a person not interested in the affairs of the company, to recover penalties for alleged offences, under certain Acts of Parliament. The company thereupon applied for an injunction to restrain the proceedings in the police court until the hearing of the petition, which was granted by Kay, J., under Sect. 85 of *The Companies' Act*, 1862, which provides that "the court may, at any time after the presentation of a petition for winding up a company under this act, and before making an order for winding up the company, upon the application of the company or any creditor or contributory of the company, restrain further proceedings in any action, suit or proceeding against the company upon such terms as the court thinks fit." (See 45 Vict. c. 23, s. 20 (D).)

## ATTACHMENT OF DEBTS—EFFECT OF GARNISHEE ORDER—PRIOR EQUITABLE ASSIGNMENT.

In *re General Horticultural Co.*, 32 Chy. D. 512, Chitty, J., held that the service of an attaching order upon a garnishee, binds only so much of the debt owing from the debtor to the garnishee, as the debtor himself could honestly deal with at the time the attaching

order was made, and consequently the attaching creditor is postponed to a prior equitable assignment of the debt, even though the assignee may not have given notice to the debtor of the assignment.

## WILL—ERRONEOUS STATEMENT OF FACT IN WILL.

In *re Wood, Ward v. Wood*, 32 Chy. D. 517, the question was, How far a legatee is bound by a statement in a will that the testator had advanced him a sum of money named, which sum he is by the will required to bring into hotchpot for the purposes of the division of the testator's estate. The court (North, J.,) decided that the legatee was bound by the statement in the will, and was not at liberty to go into evidence to show that the advance which had been made was of a less amount than that named in the will.

## PRACTICE—LEAVE TO APPEAL TO PRIVY COUNCIL.

In *Attorney-General v. Gregory*, 11 App. Cas. 229, the petitioner, who applied for special leave to appeal, had, by a special agreement in the court below, come in and consented to be made a party to the cause in appeal, and to be bound by the order of the Supreme Court of Canada to be made therein, but by the terms of the agreement the powers of the Supreme Court were defined and restricted, and its order was to be "considered a final disposition of all contentions whether now in litigation or not." Under these circumstances, their lordships were of opinion that the Supreme Court in deciding the case was acting under the terms of a special reference, and not in its ordinary jurisdiction as a Court of Appeal, and therefore its decision was not the subject of appeal, and leave to appeal to the Privy Council was therefore refused.

## VENDOR AND PURCHASER—SALE BY COURT.

The case of *Boswell v. Coaks* has, under the name of *Coaks v. Boswell*, 11 App. Cas. 232, at last come to an end, the judgment of the House of Lords reversing the judgment of the Court of Appeal, 27 Ch. D. 424, and restoring that of Fry, J., the judge of first instance, 23 Chy. D. 302. It may be remembered that the action was brought to set aside a sale made in a cause in court, on the ground that the purchaser had been a solicitor for one of the defendants, and had thus acquired peculiar

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knowledge as to the value of the property, and also on the ground that he had not made a full disclosure to the court of all the information he possessed in reference to the property in question. The defendant had obtained the leave of the court to bid. When the case was before the Court of Appeal that court set aside the sale, and laid down the rule that a person desirous of buying property which is being sold under the direction of the court, must either abstain from laying any information before the court in order to obtain its approval, or must lay before it all the information he possesses, and which it is material the court should have to enable it to form a judgment on the subject under its consideration; but this their lordships considered too broad a statement of the duty of a purchaser, and they held that the withholding of information on some material point on which it is neither offered nor requested, and concerning which there is no implied representation positive or negative, direct or indirect, by the purchaser in what is actually stated, constitutes no breach of duty or good faith on his part which would invalidate his purchase. On the evidence, therefore, they held that the impeached sale was valid, although their lordships were all of opinion that the leave to the defendant to bid had been improvidently granted. The duty of a purchaser at a sale by the court is thus stated by Lord Selborne, at p. 235:—

Every such purchaser is bound to observe good faith in all that he says or does with a view to the contract, and (of course) to abstain from all deceit, whether by suppression of truth or by suggestion of falsehood. But inasmuch as a purchaser is, generally speaking, under no antecedent obligation to communicate to his vendor facts which may influence his own conduct or judgment, when bargaining for his own interest, no deceit can be implied from his mere silence as to such facts, unless he undertakes or professes to communicate them. This, however, he may be held to do, if he makes some other communication which, without the addition of these facts, would be naturally or probably misleading. If it is a just conclusion that he did this intentionally, and with a view to mislead in any material point, that is fraud; and it is a sufficient ground for setting aside a contract, if the vendor was in fact so misled.

**MALICIOUS PROSECUTION—REASONABLE AND PROBABLE CAUSE—CORPORATION.**

*Abraith v. The North Eastern R. W. Co.*, 11 App. Cas. 247, was an action brought to recover damages against the defendant company for

an alleged malicious prosecution. At the trial the judge (Cave, J.) directed the jury that it was for the plaintiff to establish a want of reasonable and probable cause, and malice, and that it lay on him to show that the defendants had not taken reasonable care to inform themselves of the true facts of the case, and he asked the jury to say whether they were satisfied the defendants did take reasonable care to inform themselves of the true facts, and that they honestly believed in the case which they laid before the magistrates. The jury having answered these questions in the affirmative, the judge gave judgment for the defendants. On appeal to the Divisional Court (Grove and Lopes, JJ.), a new trial was ordered on the ground of misdirection (11 Q. B. D. 79). The Court of Appeal reversed this decision, and ordered the judgment of Cave, J., to stand (11 Q. B. D. 440). From this latter decision an appeal was had to the House of Lords, who now affirm it. The case is noteworthy for an *obiter dictum* of Lord Bramwell, who was of opinion that in no case could an action of the kind be brought against a corporation aggregate, because it is incapable of malice or motive, which he considered necessary ingredients in such a cause of action.

**PARTNERSHIP—CONTINUATION OF BUSINESS WITHOUT FRESH ARTICLES.**

*Neilson v. Mossend Iron Co.*, 11 App. Cas. 298, is an important decision on the law of partnership. After the expiration of the time limited by articles of partnership, the partners without fresh articles continued to carry on the business. The articles contained express stipulations as to the terms on which the partnership should be dissolved, or partners should be permitted to retire, and those continuing the business should be permitted to buy it as a going concern. The question was whether this clause continued operative. The House of Lords held, reversing the decision of the court below, that it did not; and that although it is true that upon the partners continuing to carry on the business after the expiration of the period limited by the articles, the original contract is deemed to be prolonged by tacit consent, yet only such conditions remain in force as are not inconsistent with any implied term of the renewed contract, and that one implied term of such a new contract is that

## RECENT ENGLISH DECISIONS—UNITED STATES CASES.

each partner has the right, when acting *bona fide*, and not for the purpose of obtaining an undue advantage, instantly to determine the partnership, and that this right could not be controlled by any express stipulations in the articles to the contrary.

LANDLORD AND TENANT—ASSENT OF LANDLORD TO ASSIGNMENT OF LEASE—PENALTIES, PENAL AND LIQUIDATED—WINDING UP—CONTINGENT DAMAGE.

The only other case in the Appeal Cases to which we think it necessary to refer is *Elphinstone v. Monkland Iron and Coal Co.*, 11 App. Cas. 332, in which several points of interest are decided by the House of Lords. In the first place, it was held that when a lease is not assignable without the consent of the lessor, the fact that the lessor did not object to the assignees taking possession cannot, irrespective of all other circumstances, be held sufficient to imply his assent to the assignment. Secondly, it was held by their lordships, reversing the decision of the court below, that where lessees were granted the privilege of placing slag from blast furnaces on land let to them, and they covenanted to pay the lessor £100 per acre for all land not restored at a particular date, the sum so agreed to be paid, though described in one part of the agreement as "the penalty therein stipulated," was not a penalty, but liquidated damages. Thirdly, their lordships further decided that when a limited company is being voluntarily wound up, a lessor of the company who has a claim against the company for damages for assigning the lease without his consent may obtain an interdict against the liquidator's dividing the surplus among the shareholders, until some provision is made to meet his future contingent claims against the company.

## SELECTIONS.

## UNITED STATES CASES.

*Corporations — Mortgage of corporate property—All stock owned by one person.*

When all the stock of a private corporation is owned by one person, a mortgage executed by him creates a valid equitable lien on the property of the corporation, enforceable against him and his representatives, and it is not necessary for the corporation as such to unite with him in the mortgage. We think the mortgage to Swift was good and operative to charge the property conveyed by it, irrespective of the attempted execution by the company. At the time of its execution, Cruikshank had become the owner of all the stock of the company, and of all its property. From that moment he might have renounced his rights under the act of incorporation, and might have conducted the business as a private individual, without corporate formalities. Being then absolute proprietor in equity of all that belonged to a purely private enterprise, in which the public had no interest whatever, we know of no principle, on the ground of public policy or otherwise, requiring his act, in charging the property for the agreed indebtedness of the corporation to Swift, for loans to and claims against it, and for his stock in it sold to Cruikshank, to be denied efficacy because he had not then reorganized the company, and brought in other persons to help him to do that in a corporate way which we think, from the very nature of the business, he had a right to abandon entirely, and even the business if he chose. A man can certainly do what he pleases with his own property, if he does not thereby prejudice any of the rights of subsisting creditors. It does not appear that any existing creditors were injuriously affected thereby. The appellees became such afterward. It is true that the corporation, as such, united (whether effectually or not it is immaterial to discuss) with Cruikshank in the mortgage. Why it was thought necessary for it to do so we do not know. Its doing so has certainly complicated the matter, and as we think, diverted the mind of the court below from

## UNITED STATES CASES.

the true and only equitable aspect of the case. If there had been no attempt on the part of the corporation to unite in the mortgage, and it had only been executed by Cruikshank, who was the sole owner of all the property mortgaged, how could it have been denied operation? And would not the persons who took stock from Cruikshank afterward, and participated in perpetuating the operations of the corporation, have held subject to the mortgage put on the effects of the corporation before they bought the stock? And with such mortgage of record, would not persons dealing with and trusting the corporation afterward be affected with knowledge of such mortgage, and be subordinated to it? There would seem to be no escape from such conclusion. In the *Bellona Co. case*, 3 Bland. 446, the chancellor says the ownership by one person of all the stock of a private corporation aggregate virtually dissolves the corporation. For the time being it certainly does suspend corporate action, although according to the now generally received understanding of the law, such sole owner may dispose of some of his stock to others and continue the corporate existence by the election of necessary officers. *Russell v. McLellan*, 14 Pick. 70; *Newton Manufacturing Co. v. White*. 42 Ga. 148; *Boone Corp.*, secs. 199, 200. While therefore the purchase by Cruikshank of all the stock in the corporation, and all its property, did not necessarily work a surrender of the company's franchise, it did virtually, for the time being, suspend its operations as a corporation until the election of new officers through new stockholders purchasing from Cruikshank. If from the moment of becoming sole owner, Cruikshank, as already suggested, had concluded to conduct the business as an individual, and without corporation formalities, can it be doubted that in such case this mortgage, executed by him, created a valid equitable lien on the property, enforceable against him and his representatives, and that in such case the execution, or attempted execution, thereof by the corporation could be wholly disregarded? The mortgage expressly provides for the payment to Cruikshank or his representatives (and not to the corporation) of any surplus proceeds after satisfying the mortgage in case of sale for default.

It thus appears that the transaction was regarded by the participants in it (and all who were interested did participate) as giving Cruikshank the absolute control and ownership of all that pertained to the company. If so, his right to equitably charge it with the company's debts and his own ought not, it would seem, to be questioned. Md. Ct. App., June 23, 1886. *Swift v. Smith*. Opinion by Irving, J.

*Exemplary damages—Tort — Husband's liability for wife's tort.*

Exemplary damages are recoverable in an action against a husband and wife for the malicious trespass of the wife, even though the husband is free from blame. When two persons have so conducted themselves as to be jointly liable for a tort, each is responsible for the injury committed by their common act; but when motive may be taken into consideration, the improper motive of one cannot be made the ground of aggravating the damages against the other if he is free from such motive. In such case the plaintiff must elect against which party he will seek aggravated damages. *Clark v. Newsum*, 1 Exch. 131. So a master, sued for the trespass of his servant, is not liable for exemplary damages, however evil the motive of the servant, if he is himself without malice. *The Amiable Nancy*, 3 Wheat, 546; *Cleghorn v. N. Y. C. & H. R. R. Co.*, 56 N. Y. 44. In all these cases it is to be observed that the plaintiff has his election to proceed against all or any of the wrong-doers; and as in such case it would be unjust to make the malicious motive of one party the ground of enhancing damages against another who is free from such motive, if the plaintiff proceeds against all, he thereby deprives himself of the right he otherwise would have had to claim exemplary damages. But the case is different when suit is brought for a tort of the wife, for which the husband is liable solely by reason of her coverture, for then the plaintiff has no election, but must proceed against both. And herein lies the distinction between this case and the cases relied upon by the defendant; for the husband is liable, not as master, but as husband, and because of the oneness of the twain in the eye of the law. We have not referred to, nor have we found, much authority for this distinction, but we think

## UNITED STATES CASES.

it must exist in principle. Vt. Sup. Ct., Aug. 21, 1886. *Lombard v. Batchelder*. Opinion by Rowell, J.

*Telegraph—Reasonable regulations—Deposit to prepay answer.*

A rule of a telegraph company requiring that a transient person sending a message calling for an answer shall deposit in advance an amount sufficient to pay for a reply of ten words is not unreasonable. The only case directly in point as to the reasonableness of these rules in their relation to the deposit of money to pay for the expected answer by transient persons, is that of *W. U. Tel. Co. v. McGuire*, 104 Ind. 130; S. C., 54 Am. Rep. 296, where it was held to be reasonable, and I am of the same opinion. I am not entirely satisfied with the grounds of that judgment; for it seems to me to place the ruling too entirely upon a mere question of etiquette between the parties to the correspondence. But there is great force in the argument of plaintiff's counsel that it is none of the telegraph company's business to enforce rules of social courtesy like that; and since it cannot know whether there will any reply, or whether if there be the circumstances may not be such that the sender of the answer should himself pay for it, and be anxious and willing to do so, the company should not refuse to send the original message, if it be paid for. He likened it to a regulation of a carrier of passengers refusing to transport a passenger at regular rates, unless he should buy a return ticket. And I take it that in an equal number of cases the relation of the parties may be such that the sender might reasonably expect and demand, notwithstanding the social rule of courtesy above referred to, that his correspondent should pay for the answer, and that in an equal number of cases he does do so. In many other cases, when the original message is solely about his own business, the sender may reasonably hope and expect the answer to be paid for by the other party. Again, often a transient person in distress, and with reduced funds, might wish to rely on the other party to pay for the answer; and since the company may protect itself by refusing to take the answer without prepayment by its sender, it would seem an unreasonable hardship, under those circumstances, to demand that he

pay for both messages in advance. Or he might wish to go away to receive the answer, or to receive it over another line, or at another place, etc., and so under many imaginable circumstances, be reasonably exempt from the burden of depositing money in advance for a message he may never receive, and find it inconvenient and expensive to get back his deposit. Hence, take it altogether, I should not support the reasonableness of this regulation wholly on the ground of the sender's obligation to pay for the answer. He may very often be not so obliged, and that is an answer to it. But I think this regulation is a reasonable one, notwithstanding the force of the plaintiff's argument, as above set forth. This is only one regulation of a carefully devised system for securing payment of tolls, consistently with enlarged accommodation of the public in allowing the customers of defendant to regulate among themselves this very matter of adjusting the burden of these tolls. I have quoted in the statement of facts the entire regulations on the subject, as I find them printed, italics and all, and an analysis of them shows that the company is endeavouring to accommodate the public as much as possible in this matter. It might reasonably, as the railroads do as to passenger fares, demand prepayment by the sender of all messages, whether they be originals or answers. But it does not do this. It allows answers to be sent at the expense of the person whose message is answered, and this is a privilege and a benefit it seeks to confer on the original sender by undertaking to collect of him that toll instead of requiring his correspondent to pay it, thereby lessening the chances of his answering at all. It requires all original messages to be prepaid or guaranteed. If guaranteed the company will allow the sender, if he choose, to place the burden of the toll and the addressee, by itself undertaking to collect the toll of him in the first instance, but of the sender at last, if the other refuses to pay. It seeks as to answers to accommodate the public in the same way, by undertaking to collect of the person addressed; and as

## UNITED STATES CASES.

I understand the regulations, the sender of the answer is not expected to pay at all, certainly not to prepay, unless it be an answer to a message which has been sent to be collected from himself, or is sent to parties away from home, or addressed to hotels: and in these last-mentioned cases he need not prepay if it be an answer to a message marked "answer prepaid." In order to give them their correspondents, and all persons who are interested in the use of the telegraph, the benefit of this system of collecting and adjusting tolls, the requirement is made that transient persons shall pay for the expected answers in advance, and it is not unreasonable, as a part of that system. It may be that a more liberal rule might be devised for transient persons, and that this one operates sometimes harshly and inconveniently; but that is not the question. In view of the whole system, a court cannot say that the power and discretion of the company to determine for itself what is best for all concerned has been unreasonably exercised. It has a choice of its own regulations, and the test of reasonableness is not whether some other would answer its purposes as well or better, but whether this is fairly and generally beneficial to the company, and all its customers. Cir. Ct., W. D. Tenn., July 1, 1886. *Hewlett v. Western Union Tel. Co.* Opinion by Hammond, J.

In *McCaffrey v. Smith*, 41 Hun. 117, it was held that neither the legislature nor a village can confer authority on a person to occupy part of the public street as a hack stand as against the adjacent lot owners. The court said: "The plaintiff is the lessee of the hotel and premises, and as such was in the actual possession and occupation thereof at the time the acts complained of were committed, and he was entitled to have the highway adjoining and in front of such premises kept free from all obstructions and nuisances. *White's Bank of Buffalo v. Nichols*, 64 N. Y. 73. The public interest in the highway is nothing but an easement which gives to individuals the right to pass or repass on foot, or with animals and conveyances, and as an incident, they may do all acts necessary to keep the highway in proper repair for travelling purposes. *Kelsey v. King*, 33 How. Pr. 39. Any use of a high-

way except for the purposes of travelling, and the making of necessary repairs under the direction of proper authorities, constitutes a trespass against the adjoining owner. *Jackson v. Hathaway*, 15 Johns. 447; *Adams v. Rivers*, 11 Barb. 390. And actions of trespass or ejectment may be maintained therefor. *Bloomfield Gas-light Co. v. Calkins*, 62 N. Y. 386. The legislature undoubtedly had the power to authorize the village authorities to pass ordinances and by-laws (which they might enforce) limiting and restricting the use which the public might make of the streets beyond their rights of travel—ordinances which could be enforced as against the adjoining owners themselves, for the purpose of keeping the streets open to free and uninterrupted travel. But the Legislature had not the power, neither had the municipal authorities, as against the adjoining owner, to confer upon any person the right to make use of the highway for any other purpose than to pass and repass without the consent of the owner of the fee. *Williams v. N. Y. C. R. Co.*, 16 N. Y. 97; *Henderson v. Same*, 78 id. 423; *Knox v. Mayor*, 55 Barb. 404; *People v. Mayor*, 59 How. Pr. 277. As the by-laws in question afforded no protection to the defendants for the acts of trespass, committed as against this plaintiff, the evidence was properly excluded." To the same effect is *Branahan v. Hotel Co.*, 39 Ohio St. 333; S. C., 48 Am. Rep. 457.—*Albany L. J.*

LITTELL'S LIVING AGE. The numbers of *The Living Age* for September 18th and 25th contain. "The Voice of Memnon," *Edinburgh*; "The Flight to Varennes," and "The Growth of the English Novel," *Quarterly*; "Moss from a Rolling Stone," *Blackwood*; "A Drive through the Blue Wicklow Mountains," *Tinsley's*; "Some Unconscious Confessions of De Quincey," *Gentlemen's*; "Orchards," *Spectator*; "The Baku and the Egyptian Petroleum Industry," *Economist*; with instalments of "The Mesmerist," by the late IVAN TURGENIEFF; "Prince Coresco's Duel," and "Ballairai Durg," and poetry.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price (\$8) is low; while for \$10.50 the publishers offer to send any one of the American \$4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

## DIVISION COURT CLERKS' ASSOCIATION.

## DIVISION COURTS.

## DIVISION COURT CLERKS' ASSOCIATION.

EARLY in this year an association was formed by a number of the Division Court clerks in Ontario, having for its object the protection of their body, and the furtherance of the interests of the Division Courts; and having in view, amongst other matters, the desirability of securing uniformity in practice, and settling difficulties arising in the interpretation of the tariff. Questions arising under this tariff have often proved sources of irritation and vexation, and the desirability of a uniform practice in all the Courts goes without saying. It was also thought that the result of the clerks getting together for consultation from time to time might be some suggestions to the Legislature in reference to changes in the law which would facilitate the administration of justice in these Courts.

We have received from the secretary of the association, and are happy to make space in our columns for the minutes of the last meeting of the association as follows:—

*Minutes of Special Meeting of Division Court Clerks' Association of Ontario, held at Court House, in the City of Toronto, on Tuesday, the 14th September, 1886.*

Present—R. W. Errett, Esq., President; J. McIntosh, Esq., 1st Vice-President; W. G. Fraser, Esq., 2nd Vice-President; and Hy. Jennings, Secretary-Treasurer, with about fifty members.

The President took the Chair, and called the meeting to order, at 2.15 p.m.

The minutes of the last meeting were read and confirmed.

The Secretary then read a number of letters from members of the association giving reasons for their non-attendance.

His Honor Judge Sinclair was then introduced by the President, and gave a most interesting address, in which he complimented the association on its success so far, and predicted a happy future for it. He said that he considered it a move in the right direction, as he considered that the Division Court Clerks were, in his opinion, one of the principal factors in the administration of the laws of the country. He also stated that he had been somewhat taken by surprise by the asking of his opinions on several points which had been submitted to this meeting, and that he would be very happy to give his opinions as far as he could; but could not undertake to reply to them finally here,

as some of them required looking into, but that at the same time he would make this offer that, if these or any questions were submitted to him through the medium of the association by the hands of the President or Secretary, he would be happy to reply to them in writing, but would not undertake to answer any individual correspondence. He also suggested the great advisability of the association having a good Executive Committee to bring before the Government and Board of County Judges any suggestions that might be deemed of importance to the Clerks as a whole, at the same time pointing out that the whole body of Clerks must be in unity together so as to have weight.

At the conclusion of his speech, a hearty vote of thanks was tendered to his Honor by the meeting, to which he replied in suitable terms. Several questions which had been forwarded to the Secretary were then given out and discussed.

Jas. Dickey, Esq., Inspector of Division Courts, then addressed the meeting, expressing his pleasure at being present, and corroborating the opinions expressed by his Honor Judge Sinclair, and giving it as his opinion that this and similar meetings would conduce most favourably towards a uniform understanding of the tariff and also procedure.

A hearty vote of thanks was tendered to Mr. Dickey for his present kindness, as well as for the great courtesy and kindness he had shown to all Clerks since his appointment.

Mr. O'Brien, editor of the *Canada Law Journal*, was then introduced to the meeting, and made a happy and entertaining speech, expressing the most kindly feelings towards the association, and at the same time stating that he was prepared to make some arrangements whereby a space could be afforded the Clerks in the *Law Journal* for discussion and enquiries.

A vote of thanks was also tendered to Mr. O'Brien for his kind offer.

Several questions were then propounded and discussed upon relative to fees, procedure and other matters.

Some accounts were presented and ordered to be paid.

The Executive Committee then presented draft of constitution and by-laws, which were discussed clause by clause, and, after some alterations had been made, were adopted. On motion, it was decided that the present officers should hold office until the next annual meeting in September, 1887. The Secretary was instructed to have copies of the by-laws and constitution printed and distributed, also copies of the minutes of this meeting.

HY. JENNINGS,  
Secretary-Treasurer.

In accordance with the above suggestion, arrangements have been made to give space in each number of this journal or as often as occasion may require, for the publication of matters of interest to Division Court officers and those practising in these now important courts. Correspondents will kindly be as brief and pointed as possible as our space is limited.



## LAW SOCIETY OF UPPER CANADA.

## Law Society of Upper Canada.



## OSGOODE HALL.

TRINITY TERM, 1886.

During this Term the following gentlemen were called to the Bar, namely:—*Sept. 6th*—John Murray Clarke (Honours and Gold Medal); William Smith Ormiston, Edward Cornelius Stanbury Huycke, William Murray Douglas, William Chambers, William Nassau Irwin, George Henry Kilmer, Francis Cockburn Powell, Lawrence Heyden Baldwin, Lyman Lee, Robert Charles Donald, George Hutchison Esten, Thomas Urquhart, Joseph Coulson Judd, Walter Samuel Morphy, John Wesley White, Thomas Johnson, William H. Wardrope, Francis Edmund O'Flynn. *Sept. 7th*.—Thomas Joseph Blain (who passed his examination in Trinity Term, 1885), William Lees, Charles True Glass, Alexander David Hardy, John Campbell, Richard John Dowdall, John Carson, Richard Vanstone, George Edward Evans, Charles Bagot Jackes. William Hope Dean; and *Sept. 17th*, William Robert Smythe (who passed his examination in Hilary Term, 1886). The following gentlemen received Certificates of Fitness to practise as Solicitors, namely:—John Murray Clarke, George Hutchison Esten, Wm. Smith Ormiston, Wm. Chambers, Alex. McLean, Robt. George Code, Henry Smith Osler, Edward C. S. Huycke, Wm. John McWhinney, Wm. Murray Douglas, Chas. True Glass, Robt. Charles Donald, Herbert McDonald Mowat, Francis Edmund O'Flynn, Lawrence Heyden Baldwin, John Bell Dalzell, Lyman Lee, Augus McCrimmon, Ranald D. Gunn, Joseph Coulson Judd, Heber Hartley Dewart, John Wesley White, Alex. David Hardy, Wm. Mansfield Sinclair, Hubert Hamilton Macrae, John Geale (who passed his examination in Hilary Term, 1886, also received his Certificate of Fitness). The following were admitted into the Society as Students and Articled Clerks, namely:—

*Graduates*.—George Ross, John Simpson, George Wm. Bruce, John Almon Ritchie, James Armour, John Miller, Frederick McBain Young, Malcolm Roblin Allison, Robert Baldwin, Charles Eddington Burkholder, Alexander David Crooks, Andrew Elliott, Robert Griffin Macdonald, Thomas Joseph Mulvey, James Milton Palmer, James Ross, John Wesley Roswell, Richard Shiell, Alfred Edmund Lussier, Charles Murphy, George Newton Beaumont, Charles Elliott.

*Matriculants of Universities*.—William Johnston, Samuel Edmund Lindsay, Nelson D. Mills.

*Junior Class*.—Richard Clay Gillett, Alexander James Anderson, George Prior Deacon, Louis A. Smith, Andrew Robert Tufts, William Wright, Kenneth Hillyard Cameron, Harry Bivar Travers, John Alfred Webster, Thomas James McFarlen, William Elijah Coryell, John Henry Glass, Albert Henry Northey, Archibald Alexander Roberts, Charles B. Rae, George S. Kerr, William Egerton Lincoln Hunter, Francis Augustus Buttrey, Frederick Thomas Dixon, Hector Robert Argue Hunt, Daniel O'Brien, Franklin Crawford Cousins, Thomas Alexander Duff, William G. Bee, Stephen Thomas Evans, William Mott, Thomas Arthur Beament, and John Alexander Mather was allowed his examination as an Articled Clerk.

## SUBJECTS FOR EXAMINATIONS.

*Articled Clerks.*

- 1884 and 1885. { Arithmetic.  
Euclid, Bb. I., II., and III.  
English Grammar and Composition.  
English History—Queen Anne to George III.  
Modern Geography—North America and Europe.  
Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

*Students-at-Law.*

1884. { Cicero, Cato Major.  
Virgil, Æneid, B. V., vv. 1-361.  
Ovid, Fasti, B. I., vv. 1-300.  
Xenophon, Anabasis, B. II.  
Homer, Iliad, B. IV.  
Xenophon, Anabasis, B. V.  
Homer, Iliad, B. IV.  
1885. { Cicero, Cato Major.  
Virgil, Æneid, B. I., vv. 1-304.  
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

## ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY

English History from William III. to George II. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography Greece, Italy and Asia Minor. Modern Geography North America and Europe.

Optional subjects instead of Greek:

## LAW SOCIETY OF UPPER CANADA.

## FRENCH.

A paper on Grammar,

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

## OF NATURAL PHILOSOPHY.

Books—Arnett's elements of Physics, and Somerville's Physical Geography.

*First Intermediate.*

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

*Second Intermediate.*

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

*For Certificate of Fitness.*

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

*For Call.*

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchers, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six.

## LAW SOCIETY OF UPPER CANADA.

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchers, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## F E E S .

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

## PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890.

*Students-at-law.*

## CLASSICS.

1886.	Cicero, Cato Major.
	Virgil, Æneid, B. I., vv. 1-304.
	Cæsar, Bellum Britannicum.
	Xenophon, Anabasis, B. V.
1887.	Homer, Iliad, B. VI.
	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. VI.
	Cicero, In Catilinam, I.
1888.	Virgil, Æneid, B. I.
	Cæsar, Bellum Britannicum.
	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. IV.
1889.	Cæsar, B. G. I. (vv. 1-33.)
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. I.
	Xenophon, Anabasis, B. II.
1890.	Homer, Iliad, B. VI.
	Cicero, In Catilinam, II.
	Virgil, Æneid, B. V.
	Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

## MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

## ENGLISH.

A Paper on English Grammar.

Composition.

Critical reading of a Selected Poem:—

1886—Coleridge, Ancient Mariner and Christabel.

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Child Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

## HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe. Optional Subjects instead of Greek:—

## FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886

1888 } Souvestre, Un Philosophe sous le toits.

1890

1887 } Lamartine, Christophe Colomb.

1889

or, NATURAL PHILOSOPHY.

Books—Arnot's Elements of Physics; or Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

## ARTICLED CLERKS.

Cicero, Cato Major; or, Virgil, Æneid, B. I., vv. 1-304, in the year 1886; and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, or Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-Keeping.

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.

# Canada Law Journal.

VOL. XXII.

OCTOBER 15, 1886.

No. 18.

## DIARY FOR OCTOBER.

- 15. Fri....English law introduced into Upper Canada, 1792.
- 16. Sat....C. C. York term ends.
- 17. Sun....17th Sunday after Trinity.
- 18. Thur....Battle of Trafalgar, death of Nelson, 1805.
- 19. Sun....18th Sunday after Trinity.
- 20. Mon....Battle of Balaklava, 1854.
- 21. Tues....Primary examination for students and articulated clerks. Sittings of Supreme Court Canada begin.
- 22. Thur....Graduates seeking admission to Law Society to present papers.
- 23. Sun....19th Sunday after Trinity.

TORONTO, OCTOBER 15, 1886.

We would suggest to the County of York Law Association, the propriety of putting a telephone up in the library in the Court House, so that members of the profession with offices in the near neighbourhood might the more conveniently use the library, and yet be always easily summoned back to their offices when required. The convenience of this would, we submit, far outweigh any inconvenience arising from the use of the telephone in the room.

FURTHER consideration of Rule 599 has, we believe, led the judges of the Chancery Division to the conclusion that the practice of filing reports in the office of the Masters by whom they are made is erroneous, and that they should be filed in the office of the Local Registrar, or Deputy Registrar, or Deputy Clerk of the Crown, at the place where the Master making the report holds office. We do not think this conclusion is likely to simplify the difficulties referred to *ante* p. 234. The only remedy is the abrogation of the Rule, and restoring the former practice in Chancery.

We are afraid this new ruling will only make "confusion worse confounded."

A Mr. J. Eliot Hodgkin, of Richmond, England, writes to *Pump Court* that he has in his possession the following letter, which will be of interest to all those who hail from "Osgoode Hall":—

TEMPLE COFFEE HOUSE,  
15th May, 1794.

The Immortal Jupiter congratulate the Lord Chief Justice Osgoode on his appointment.

Snowdon Barne (*President*), Nat. Bond, J. Floud, B. Bathe, Wm. Pott (?), W. Syer, V.P., Edward Cotton, T. Partington, Richard Legard, Jno. Touchet, H. Tripp, H. C. Litchfield.

To the Honourable William Osgoode, Chief Justice of Quebec.

We have no information as to who or what this Jovian person or club may be. Perhaps some of our readers may have heard of it.

## THE FACTORIES ACT.

THE Provincial Government has we see at last taken heart of grace, and in the *Gazette* of the 9th instant has issued the proclamation of the Lieutenant-Governor declaring that the 47 Vict. c. 39, known as "The Factories' Act," shall go into full force and effect from and after the 1st day of December next. No doubt the question of the constitutionality of this Act, about which there has been considerable doubt, will soon be raised in a formal manner. Considering that two years and a half have elapsed since the Act was placed on the statute book, the Government cannot be accused of any rash haste in bringing it into force, on the contrary, ample time has been taken for considera-

## STATISTICS OF LITIGATION.

tion, and it remains to be seen whether the conclusions which have been reached will be sustained by the Courts.

### STATISTICS OF LITIGATION.

THE Inspector of Legal Offices has collected some statistics of legal business, which are printed in his last annual report; and from them we learn that during the year ending 31st December, 1885, there were in all 7,119 actions commenced by writ of summons in the High Court; of these 4,376 writs were issued from the Q. B. and C. P. Divisions, and 2,743 from the Chancery Division, the greatest amount of business being of course transacted in Toronto, where 1,832 actions were commenced; next comes St. Thomas, with 611 suits, (for reasons give below we think there is a mistake) then London, with 522, and then Hamilton, with 411. There is one feature about these statistics which is deserving of notice, and that is the fact that notwithstanding Rule 545 providing for the alternate issue of writs in the three Divisions of the High Court, according to the figures given by the inspector, a large preponderance of these actions appear to have been commenced in the Chancery Division. According to the number of writs stated to have been issued in the Q. B. and C. P. Divisions, 2,188 writs ought to have issued in the Chancery Division; but according to the inspector's return 2,743 writs actually issued in that Division, or 555 more than the proper proportion, or about one-fourth more than issued from either of the other Divisions. On looking through the figures, however, we think it possible this result is really due to some mistake. In Elgin 101 writs are said to have issued in the Q. B. and C. P. Divisions, and 510 in the Chancery Division. We are inclined to think that a cypher has been improperly added to these figures, and that 51 instead of 510 is the

correct number of writs issued in the Chancery Division in that county. If we are correct, this would account for 450 of the apparent surplus of writs in the Chancery Division, but we do not see how the remaining 100 suits are to be accounted for, consistently with the proper observance of Rule 545.

There is another item in the Inspector's report deserving of observation. While 3,074 cases were entered in the Procedure Book in the Q. B. and C. P. Divisions, 1,624 were entered in the Chancery Division. These figures we understand to indicate the number of suits which proceeded to the pleading stage in the different Divisions. But when we come to the number of cases tried, we find 753 cases were tried with a jury, and 401 without a jury, in the Q. B. and C. P. Divisions, whereas only 14 cases were tried with a jury, and 425 without a jury in the Chancery Division. The recent Rules, 590-592, may possibly be found to make a change in the future statistics of this branch of business.

Turning to the statistics of the sheriff's offices we note a fact which appears to us somewhat surprising. Although 2,190 writs against goods appear to have issued out of the High Court, only 210 sales under such writs took place. In other words, only about 10 per cent. of all writs of *fi. fa.* goods culminated in an actual sale of goods by the sheriff. The writs against lands numbered 1,649, but the sales of lands under execution only number 43. While \$66,105.16 was realized by sale under executions against goods issued from the High Court, and \$19,842.15 under *fi. fas.* against lands, we find that \$992,838.97 was realized under executions without sale. In the County Court on the other hand we find while \$38,588.64 was realized by sale under *fi. fas.* goods, and \$7,062.21 under *fi. fas.* lands, only \$68,345.46 was realized under executions without a sale.

## COMMON LAW EQUITY.

## COMMON LAW EQUITY.

The case of *Weir v. The Niagara Grape Co.*, 11 O. R. 700, appears to us to furnish a specimen of what may be called "common law equity," or the kind of law which a common law lawyer is apt to mistake for "equity."

The case before the court was a very simple one. The plaintiff, on 31st March, 1884, being mortgagee of the lands in question, under several mortgages, took from the mortgagor, John Kievell, a release of his equity of redemption in consideration of the amount due on the mortgages. The mortgages and the release of the equity of redemption were all taken without notice of an agreement which Kievell, the mortgagor, had made with the Niagara Grape Co. for the purchase of certain vines planted on the mortgaged property, and by the terms of which agreement the vines were to remain the joint property of Kievell and the Company until paid for; and in the event of Kievell alienating the land before the price should be paid, it was to form a lien on the land. This agreement was made in 1882, but was not registered until after the plaintiff's conveyance of 31st March, 1884; and the object of the suit was to obtain a declaration that the agreement of 1882 was fraudulent and void as against the plaintiff, and to have the agreement of 1882 removed from the register as a cloud upon the plaintiff's title.

Under the circumstances the court conceded, as it would be impossible to do otherwise, that the agreement of 1882 is, under the provisions of sec. 74 of the Registry Act, fraudulent and void as against the plaintiff; and, having arrived at that conclusion, one would have thought that that which is admitted to be fraudulent and void as against the plaintiff, and which was utterly inconsistent with the absolute title claimed by him, would have

been ordered to be removed from the register.

The court, however, was unable to arrive at that conclusion; but, *mirabile dictu!* made a declaration that the deed of the plaintiff was entitled to priority over the agreement of 1882, upon the plaintiff paying to the Niagara Grape Co. what was due to them under that agreement; and whether the plaintiff chose to accept relief on these terms or not, gave the Niagara Grape Co. that relief as against the plaintiff in any event.

The rationale of the Registry Act appears to be this: All instruments affecting the title are required to be registered, in order that third persons dealing with the land may have notice of their existence. If a person takes a conveyance from the registered owner and neglects to register it, he enables the grantor to pass himself off as still the owner, and he becomes, by his neglect, a passive party to the fraud, if the latter assumes to make a subsequent conveyance of the property. The Registry Act, therefore, declares that as between an unregistered purchaser and a subsequent purchaser who first registers his conveyance, the latter shall prevail, and that as against him the prior unregistered instrument shall be adjudged fraudulent and void. Now it certainly is the queerest way of administering this very beneficial Act to say "true it is that this prior instrument is fraudulent and void as against you; yet it shall remain on the register and be a cloud on your title, unless you give to the person entitled thereunder all the benefit and advantage he would have had if he had duly registered his conveyance." And yet that in substance is what the court did in this case.

The court was led into, what appears to us, this erroneous conclusion by the fallacious reasoning of Armour, J., who delivered the judgment of the court. He says at p. 716: "If the plaintiff is entitled

## COMMON LAW EQUITY—LAW SOCIETY.

to relief; then if A. makes a mortgage to B. on the first of the month, and another to C. on the tenth of the same month, and C. registers his mortgage, and subsequently B. registers his, and C. has no actual notice of B.'s mortgage, C. will be entitled to maintain a bill to vacate the registry of B.'s mortgage, because it is by the Registry Act to be adjudged fraudulent and void as against him, and being of a prior date to his mortgage it causes him embarrassment in disposing of his mortgage."

This, however, is a simple *non sequitur*; and the fallacy arises from the common law notion that the same judgment must follow in every case coming within sec. 74, irrespective of the circumstances. To an equity lawyer this method of reasoning must appear absurd, because he is aware that the particular circumstances of each case must be considered in administering equity, and the judgment must be bent to suit the circumstances.

The aim of equity, properly understood, is to do substantial justice between litigants, and while giving one party his rights, not needlessly to oppress his adversary nor infringe upon his rights.

In the case which Mr. Justice Armour puts, we think the obvious answer is, that the equity of the case would be amply answered by a simple declaration that the subsequent mortgage of C., by virtue of its prior registration, was entitled to priority over that of B.—that would enable C. to dispose of his mortgage, or otherwise deal with the mortgaged property as amply as if he had been first in date as well as by registration. To decree under such circumstances a removal of B.'s mortgage from the register would be an injury to B. beyond what the necessity of doing justice to C. would call for. But where, as in the case before the court, the subsequent conveyance is an absolute conveyance of the whole estate, and the existence of any

outstanding lien or interest in any third person is altogether inconsistent with the subsequent grantee's possession of that absolute estate, then equity requires, in order that full justice may be done to the subsequent grantee, that the prior deed, which is subsequently registered, should be removed from the register.

We should hope that the case may be carried to appeal, as in our judgment it amounts to a virtual repeal of sec. 74 of the Registry Act.

## LAW SOCIETY.

## TRINITY TERM, 1886.

THE following is the *résumé* of the proceedings of Convocation on the 29th June, and of Trinity Term, 1886.

TUESDAY, 29TH JUNE.

Convocation met.

Present—The Treasurer, and Messrs. Falconbridge, Foy, Fraser, Irving, McCarthy, Mackelcan, MacLennan, Martin, Morris, Moss, Murray, Osler, Purdom, Robinson, Smith.

The minutes of last meeting were read and approved.

Mr. Murray presented a joint report from the Committee on Finance and Legal Education on the subject of fees to examiners on primary examination, recommending that when one examiner conducts the whole examination the same rate of remuneration be allowed as when two act, and that this apply to the last primary examination.

The report was read and received.

Ordered for immediate consideration and adopted.

Mr. Murray introduced a rule to give effect to the report.

Ordered, that the rule be read a first time.

Ordered for a second reading on the second day of next Term.

## LAW SOCIETY.

Mr. Moss presented the report of the Legal Education Committee on the admission as Students-at-Law of graduates, pursuant to the rule of 29th May, 1885, showing the admission of the following candidates, viz.:

William Gregor Bain, Thomas Walter Ross MacRae, Donald Murdoch Robertson, Gordon James Smith, Francis Pedley, Charles Swabey, Samuel Hugo Bradford, Hume Blake Cronyn, Horace Harvey, Alexander McLean Macdonell, Dugald James MacMurchy, Francis James Roche, Thomas Alfred Rowan and Roland William Smith.

The report was received, considered and adopted.

Ordered, that the above named students be entered on the books of the Society as Students-at-Law in the graduate class as of the first Monday of Easter Term, 1886.

Ordered, that the Legal Education Committee be requested to consider the draft of the consolidation of the statutes affecting the Law Society, with a view to suggesting the removal of any ambiguities in the law.

The report of the Committee on Legal Education on the petition of C. J. Patterson was received, considered and adopted.

The report of the Finance Committee on the subject of the fees payable by Articled Clerks and Students-at-Law was received and ordered for immediate consideration.

Ordered, that it be referred to the Committee on Legal Education to report their views to Convocation.

Mr. Owens was called to the Bar.

The letter of Mr. Read, the solicitor in the matter of L. U. C. Titus, was read.

The petition of L. U. C. Titus was read and received.

Ordered, that the petition be referred to the Discipline Committee.

The letter of Mr. Ryan, Secretary of the Hamilton Law Association, enclosing a resolution on the subject of the law library, was read and received.

The petition of Antoine Gilly was referred to the Finance Committee with power to act.

A letter from Mr. Joseph, with draft of revision of chapters 138, 139, 140, of Ontario Statutes, was received.

Ordered, that it be referred to the Com-

mittee on Legal Education with power to act.

The report of the Law School was brought up for consideration.

The rule for the continuance of the Law School was read a second time.

Mr. Moss moved, seconded by Mr. Irving, the third reading of the same rule.

Mr. Martin moved, in amendment, that the rule be amended by adding "that the students attending lectures be required to pay an annual fee of five dollars for attendance."

The amendment was lost.

The rule was read a third time and passed.

Mr. Murray, seconded by Mr. Moss, moved the second reading of the rule to amend the rules for the encouragement of legal studies.

The rule was read a second and third time and passed.

The second reading of the rule to amend rule 155 was postponed until the second day of next Term.

Mr. Martin gave notice that on the second day of next Term he would introduce a rule for the amendment of rule 142, section E.

Mr. Martin moved, seconded by Mr. Moss, that the Reporting Committee be requested to lay before Convocation, at its next meeting, an estimate of the probable cost of a current quarterly index of the reports published by the Law Society, such index to be published in a form similar to the current index published in connection with English Law Reports.

Convocation adjourned.

During Trinity Term the following gentlemen were called to the Bar, viz., September 6th:—John Murray Clark (honors and gold medal), William Smith Ormiston, Edward Cornelius Stanbury Huycke, William Murray Douglas, William Chambers, William Nassau Irwin, Lawrence Heyden Baldwin, Lyman Lee, Robert Charles Donald, George Hutchison Esten, Joseph Coulson Judd, Walter Samuel Morphy, John Wesley White, Thomas Urquhart, Thomas Johnson, William Hugh Wardrope, Francis Edmund O'Flynn, George Henry Kilmer, Francis Cockburn Powell. September 7th:—Thomas Joseph Blain, William Lees, Charles True Glass, Alexander David Hardy, John Campbell, Richard John



## LAW SOCIETY.

Dowdall, John Carson, Richard Vanstone, George Edward Evans, William Hope Dean, Charles Bagot Jackes. September 17th:—William Robert Smyth.

The following gentlemen were granted Certificates of Fitness, viz., September 6th:—J. M. Clark, G. H. Esten, W. S. Ormiston, W. Chambers, A. McLean, R. G. Code, W. J. McWhinney, C. T. Glass, R. C. Donald, F. E. O'Flynn, L. H. Baldwin, R. D. Gunn, H. H. Dewart, J. White. September 7th:—J. C. Judd, L. Lee, W. M. Sinclair, H. H. Macrae, H. S. Osler, A. D. Hardy, A. Macrimmon, J. Geale, W. M. Douglas, H. M. Mowat, J. B. Dalzell. September 17th:—E. C. S. Huycke.

The following gentlemen passed the First Intermediate Examination, viz.:—H. J. Cosgrove (honors and first scholarship), J. A. V. Preston (honors and second scholarship), W. Mundell (honors and third scholarship), and Messrs. J. G. Kerr, H. E. Irwin, H. B. Witton, J. A. Chisholm, W. S. McBrayne, A. E. K. Grier, J. F. Woodworth, Ira Standish, E. H. Johnston, R. W. Thompson, J. Kyles, W. W. Dingman, H. Holman, D. A. Dunlop, H. Millar, T. A. Rowan, J. McKean, J. A. McLean (as Student-at-Law only).

The following gentlemen passed the Second Intermediate Examination, viz.:—R. J. McLaughlin (honors and first scholarship), J. M. Young (honors and second scholarship), and Messrs. M. Wright, R. J. Leslie, W. J. Millican, W. B. Lawson, A. McNish, J. M. McWhinney, F. M. Field, A. J. Boyd, J. M. Balderson, E. H. Ridley, J. H. Kew, T. C. Robinette, G. J. Cochrane, R. A. Grant, J. A. Davidson, T. M. Bowman, W. H. Campbell, Jr., H. O. E. Pratt, J. A. McLean, R. C. Levisconte, T. R. Ferguson, G. L. Lennox.

The following candidates were allowed their examinations as Students only, viz.:—W. A. F. Campbell, C. R. Boulton, J. Ross, T. Hornsby, W. E. Thompson, G. H. Douglas.

The following gentlemen were admitted into the Society as Students-at-Law:—

*Graduates.*

George Ross, John Simpson, George William Bruce, John Almon Ritchie, James Armour, John Miller, Frederick McBain Young, Malcolm Roblin Allison, Robert Baldwin, Charles Eddington Burkholder,

Alexander David Crooks, Andrew Elliott, Robert Griffin McDonald, Thomas Joseph Mulvey, James Milton Palmer, James Ross, John Wesley Rosswell, Richard Shiell, Alfred Edmund Lussier, Charles Murphy, George Newton Beaumont.

*Matriculants.*

William Johnston, Samuel Edmund Lindsay, Nelson D. Mills.

*Junior Class.*

R. C. Gillett, A. J. Anderson, G. P. Deacon, L. A. Smith, A. R. Tufts, W. Wright, K. H. Cameron, H. B. Travers, J. A. Webster, T. J. McFarlen, W. E. Coryell, J. H. Glass, A. Northey, A. A. Roberts, C. B. Rae, G. S. Kerr, W. E. L. Hunter, J. A. Buttrey, F. T. D. Hector, R. A. Hunt, D. O'Brien, F. C. Cousins, T. A. Duff, W. G. Bee, S. T. Evans, W. Mott, S. A. Beaumont.

*Articled Clerk.*

J. A. Mather.

MONDAY, 6TH SEPTEMBER.

Convocation met.

Present—The Treasurer and Messrs. S. H. Blake, Foy, Fraser, Irving, Lash, Macleannan, Moss and Murray.

The letter of Mr. Delamere, resigning his office of Examiner of the Law Society and Chairman and Lecturer of the Law School, was received and read.

Ordered, that the usual advertisement be inserted for applicants for the office of Examiner in place of Mr. Delamere, resigned.

Ordered, that the Secretary notify the Benchers that a successor to Mr. Delamere will be appointed at the meeting of the Bench on Friday, September 17th.

The letter of Mr. D. R. Davis was received and read.

Ordered, that the papers of Mr. Davis be laid before Convocation to-morrow for such action as was taken in the like case of R. D. Gunn.

The petition of Mr. Mundell was received and read.

Ordered to be referred to the Legal Education Committee for report to-morrow.

The report of the Select Committee on the subject of Honors and Scholarships, in connection with the First Intermediate examination, was received and read.

## LAW SOCIETY.

Ordered for immediate consideration and adopted.

Ordered, that Messrs. Cosgrove and Preston be allowed the First Intermediate Examination with honors, and that Mr. Cosgrove do receive a scholarship of one hundred dollars, and Mr. Preston a scholarship of sixty dollars, and that the case of Mr. Mundell, as to honors and third scholarship, be reserved till after the report on his petition.

The report of the Committee on Honors and Scholarships, in connection with the Second Intermediate Examination, was received and read.

Ordered for immediate consideration and adopted.

Ordered, that Messrs. McLaughlin and Young be allowed their Second Intermediate Examination, with honors, and that Mr. McLaughlin do receive a scholarship of one hundred dollars, and Mr. Young a scholarship of sixty dollars.

Ordered, that the Finance Committee be authorized to act from time to time, in their discretion, on any application of the County Court Judges for the use of Convocation Room for their conferences.

Mr. Murray moved, that Mr. Moss, Chairman of the Legal Education Committee, be appointed representative of the Law Society at the Senate of the University of Toronto.—Carried unanimously.

## TUESDAY, 7TH SEPTEMBER.

Convocation met.

Present—The Treasurer, and Messrs. Beaty, S. H. Blake, Cameron, Fraser, Hoskin, Lash, McCarthy, Mackelcan, Moss and Murray.

The minutes of last meeting were read and approved.

The letter of H. R. Hardy was read, ordered to be referred to the Finance Committee to consider and report their opinion to Convocation.

Pursuant to the order of yesterday the papers of D. R. Davis were laid on the table and inspected by Convocation, and the values of the answers as allowed to him on the examination having been added up, and it having been found that the totals were correctly reported to Convocation, it was ordered that the Secretary do inform Mr. Davis that there had been no omission or oversight in the examination of his papers.

Ordered that the order for the second reading of Mr. Britton's proposed rule as to the Supreme Court Reports be postponed to Friday, 17th instant.

Mr. Murray's proposed rule for the amendment of rule respecting the remuneration of the examiner conducting the Primary Examinations was read a second and third time, and passed.

Mr. Irving presented the report of the Library Committee, as to the catalogue and thefts from the library.

The report was ordered for immediate consideration, and adopted.

## SATURDAY, 11TH SEPTEMBER.

Convocation met.

Present—The Treasurer, and Messrs. Falconbridge, Foy, Hoskin, MacLennan, Martin, Moss, Murray, McMichael.

The minutes of last meeting were read and approved.

Mr. Moss, from the Committee on Legal Education, reported in the case of Mr. Mundell.

The report was received, ordered for immediate consideration, and adopted.

Ordered that Mr. Mundell be allowed his First Intermediate Examination with honors, and that he be awarded the third scholarship.

Mr. Murray presented the report of the Finance Committee, in the matter of H. R. Hardy's letter, recommending that the sum of \$100 be allowed to him toward getting out his chart, on the condition that one dozen copies of said chart be supplied to the Law Society by him free of charge.

Ordered for immediate consideration, and adopted, and the grant to Mr. Hardy ordered accordingly.

Mr. MacLennan presented the report of the Reporting Committee.

Ordered for immediate consideration, and adopted.

Ordered that the Secretary do forthwith communicate the second paragraph of the report, as adopted, to Mr. Grant, and that the Reporting Committee do report to Convocation at its sitting on Friday next on the action taken under the second paragraph.

Mr. Martin gave notice, for the second day of next term, of the following motion: To amend Rule 142, section E, and to further amend the rule by permitting the

## LAW SOCIETY.

increase of grants to County Libraries in outer counties, and to permit advances to be made in special cases repayable out of future annual grants.

REPORT OF THE COUNTY LIBRARIES AID COMMITTEE.

Adopted by Convocation on 5th June, 1886.

OSGOODE HALL, 5TH JUNE, 1886.

*To the Benchers of the Law Society of Upper Canada :*

The County Libraries Aid Committee beg to report as follows :

1. The annexed statement shows the amounts paid to the County Libraries therein named in respect of initiatory and annual grant respectively, during the year ending 31st December, 1885, and also all payments made on annual grants up to 17th May, 1886. Nothing has been paid on initiatory during the current year.

No reports have been received for the year 1885 from the Ontario or Essex Associations. Reports were received from Bruce, Welland and Peterboro' which were incomplete in certain particulars, but these defects will, it is expected, be supplied shortly. The libraries had been established and received aid from the Law Society up to 31st December, 1885. In every case in which the annual grants have been paid, as shown by the statement referred to, the returns were sent in within the period required by the rules, and all requirements complied with.

2. Steps are being taken to form Library Associations at Guelph and Stratford, but no formal applications for aid have yet been received.

3. The value of county libraries is being more highly appreciated year by year, and applications for aid to new associations will no doubt continue to be made from time to time.

4. On the 18th May, 1886, an application for aid was received from the County of York Law Association, which was incorporated on the 31st December, 1885. The Association has furnished the proper proofs of its incorporation, and also copies of its by-laws, declaration, and a statement of its funds. This application has now to be dealt with by Convocation, but as the position of the Association is in some important points very different from that of a library association formed in an outer county, the committee have thought it desirable to report fully on the facts requiring consideration.

5. County libraries were established in 1879 upon the report of a special committee, a copy of the report will be found in the *Law Journal* for 1879, pages 179 and 181.

It appears from the report that the idea was to establish libraries in the county towns of outer counties for the convenience of the courts and profession who from necessity could not derive the same advantage from the Osgoode Hall Library as the Toronto Bar. Toronto and York, as having full use of the Osgoode Hall Library, were excluded from the calculation of those likely to avail themselves of the scheme; and Ottawa, as having the

use of the Parliamentary Library, was for that reason also excluded.

It will be seen therefore, that the terms of clause six of Rule 142, regulating the aid to be granted to libraries in outer counties, ought not to be applied to this association without very considerable modifications.

6. No action towards the formation of a county library for York and Toronto was taken till quite recently, but the advantage of having a library suitable for reference at *Nisi Prius* in the Court House at Toronto having been felt, Mr. Osler, pursuant to notice, moved in Convocation on 17th November, 1885: "That it is expedient to form a branch library at the Court House in the City of Toronto, to consist of a complete set of the statutes, a complete set of the Upper Canada and Ontario Reports, and the English Reports, beginning with the Law Reports series, with a selection of text books in common use at *Nisi Prius*, and that the City Council be requested to provide accommodation in the new Court House for such library."

Upon which it was

Ordered, that the matter be referred to the County Libraries Aid Committee for consideration and report, and that Mr. Osler be added to the said committee in respect of the matter of this notice.

A discussion took place on the consideration of Mr. Osler's motion, during which it was pointed out that there were objections to the establishment of a branch library at the expense of the Society for a purely local purpose; and that the City Council could not be compelled to furnish the accommodation asked for, but if a County Library Association were formed, the right to suitable accommodation in the Court House existed under the Amended Municipal Act of 48 Vict. c. 5, ss. 11 and 12; and the question as to the amount of aid would be considered when the Association made its application. This view apparently commended itself to those interested, as the matter was never brought before the special committee, and steps were immediately taken to incorporate the County of York Library Association.

7. Your Committee believe that a library containing such books as are in common use at *Nisi Prius* (including Chancery Sittings) is all that is required for the County of York as a county library, and although the establishment of a county library in York seems not to have been originally contemplated, yet your Committee think a sufficient reason has been established to warrant them in recommending that an initiatory grant should be made, based on this principle, because for all other than *Nisi Prius* purposes the profession have ready access to the general library at Osgoode Hall. And the close proximity of the site of the new court to Osgoode Hall renders the one place as convenient as the other for the profession, and for this reason many of the works required in other county libraries would not be needed.

8. It appears from the statement furnished by the York Association that \$1,623 has been contributed in cash, and \$260 in books. Your Committee think that in addition to this sum a grant from the Law Society of \$1,500 would be quite sufficient to purchase a suitable library of the class above indicated, and recommend that in lieu of the grant ordinarily made under section 6 of Rule 142, a special grant of \$1,500 be made as the full initiatory grant to this Association.

LAW SOCIETY—IN THE MATTER OF APPEAL OF THE REVEREND S. M.

As to the annual grant to be made it appears that there are now 196 members who pay an annual subscription of \$2.00, and half of this amount is payable by practitioners resident elsewhere in the county.

The subscription paid by the members of Law Associations in outer counties is, in most cases, \$5.00 per annum. Some pay \$10.00, but the great number of practitioners resident in Toronto makes the burden much lighter in this case.

The annual expenses of the Society for librarian's salary, insurance, and contingencies, would probably not exceed \$550.00.

An annual grant, equal to \$2.00 for each member of the Association paying his annual subscription of \$2.00, and of \$2.00 for member paying his annual subscription of \$1.00, would provide a sum quite sufficient to keep up the library in a very satisfactory manner.

9. In accordance with the above recommendation, if approved of by Convocation, Rule 142 might have to be reconsidered to meet the special case of the grant to this Association.

EDWARD MARTIN,  
Chairman.

Statement of Money paid the County Libraries' Associations from 1st January, 1885, to 17th May, 1886.

NAME.	Date.	Initiatory.	Annual.	Total.
		\$ c.	\$ c.	\$ c.
Hamilton..	1885	576 00	297 50	.....
	1886	.....	379 92	1253 42
Middlesex.	1885	480 00	180 00	.....
	1886	.....	187 50	847 50
Peterboro'..	1885	184 00	85 00	269 00
	1885	.....	36 00	.....
Frontenac.	1886	.....	42 50	78 50
	1885	.....	29 10	29 10
Bruce.....	1885	.....	82 00	.....
	1886	.....	71 00	153 00
Brant.....	1885	200 00	.....	200 00
	1885	340 00	.....	.....
Lindsay...}	1886	.....	85 00	425 00
	1886	.....	.....	147 00
Essex.....		147 00	.....	147 00
		\$1927 00	\$1475 52	\$3402 52

REPORTS.

ASSESSMENT CASES.

IN THE MATTER OF THE APPEAL OF  
REVEREND S. M.

*Exemptions—Superannuated minister.*

M., a superannuated minister of the Methodist Church of Canada, claimed that as a clergyman or minister of religion in actual connection with the Methodist Church doing duty as such, and having no other business or calling, the property on which he resided was exempt from taxation under sec. 12, cap. 42, 48 Vict. Ont.

*Held*, that such property was not exempt.

[Prescott—McDonald, Co.J.]

The Reverend S. M. appealed to the Court of Revision of the town of Prescott, against being assessed for certain real estate in said town—the ground of the appeal being as stated in the head note above. Against the decision of such court he appealed to the County Judge of the County Court of the United Counties of Leeds and Grenville, on the ground that such decision was against law and evidence.

The section or sub-section of the Act upon which he relied, was the new sub-sec. 23 of section 6 of the Assessment Act, as enacted by sec. 12 of cap. 42 of the Ontario Statutes, 48 Vict. It reads as follows :

(23) The stipend or salary of any clergyman or minister of religion, while in actual connection with any church, and doing duty as such clergyman or minister, to the extent of one thousand dollars and the parsonage when occupied as such or unoccupied, and if there be no parsonage the dwelling house occupied by him with the land thereto attached, to the extent of two acres, and not exceeding two thousand dollars in value. This sub-section shall not apply to a minister or clergyman whose ordinary business or calling at the time of the assessment is not clerical, though he may do occasional clerical work or duty.

The appellant, having been sworn, testified to his being a minister of the Methodist Church and superannuated. That superannuated ministers are stationed in a certain sense. They must be somewhere, in connection with some district, so that they can be called upon if needed. That he be called upon to act for another minister, and if in health must comply. That he is on the plan with local preachers for work. A minister is superannuated, and his superannuation allowance fixed and paid, by the conference. Old age

Com. Pleas.]

NOTES OF CANADIAN CASES.

[Com. Pleas

or physical inability is a cause for superannuation. Appellant, not employed in any business or occupation other than clerical, occupies a house in Prescott. There is a parsonage of the Methodist Church in Prescott, occupied by the Rev. George McRitchie, the regularly stationed minister of the Methodist Church in Prescott.

*Dowsley*, for appellant, cited a judgment of Judge McDougall, of county of York, in connection with the assessment of the city of Toronto, reported in the current volume of the CANADA LAW JOURNAL, page 158.

*M. E. O'Brien*, *contra*, cited *Jarvis v. Corporation of Kingston*, 26 C. P. 526.

MCDONALD, Co. J.—With all respect for the learned judge of the County Court of the county of York, I am unable to concur in the conclusion at which he arrived. In my judgment, the exemption is of the parsonage when occupied as such, or unoccupied, and if there be no parsonage, the dwelling house used in lieu of such, and as such occupied by the minister in regular duty and appointed to the particular church (not church in the sense of a religious community, but in the sense of an edifice), to which such parsonage, or the dwelling house used in lieu thereof, is attached. I dismiss the appeal and confirm the decision of the Court of Revision, and the assessment of the assessors.

## NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

### COMMON PLEAS DIVISION.

#### DIVISIONAL COURT.

O'Connor, J.] [September 11.

MCDUGALL V. HALL.

*Deed—Omission to tender for execution before action brought—Evidence that execution would have been refused—Dispensing with tender.*

The general scope of the O. J. Act, and especially sub-sec. 84 of sec. 16, requires that the matters in controversy between the parties may be completely and finally determined, and multiplicity of legal proceedings concerning such matters be avoided, so that whenever

a subject of controversy arises in an action, the Court should, if possible, determine it so as to prevent further and needless litigation.

In this case, where in strictness there should have been a tender of a conveyance for execution before action brought, but no such tender was made, and the defendant, in his statement of defence, though setting up the absence of such tender, at the same time indicated that if it had been made, he would have refused to comply therewith, and the tender would therefore have been futile.

*Held*, under the circumstances, judgment must be entered for the plaintiff.

### McLACHLIN V. GRAND TRUNK RY. CO. *Railways—Overhead bridge—Accident—Liability.*

Action to recover damages sustained by plaintiff by reason of a bridge being less than seven feet above the top of the freight car on which plaintiff was employed while in the service of the defendants. At the time of the accident the defendants were operating the Midland Railway under an agreement made 22nd September, 1883, whereby it was agreed that the defendants should "take over all" the lines of the Midland Railway, buildings, rolling stock, stores and materials of all kinds: and shall, during the continuance of this agreement, well and efficiently, work the said lines, and keep and maintain them with all the works of the Midland in as good repair as they are when so taken over." The agreement was to be in force for twenty-eight years. The Midland Railway Co., though incorporated under 44 Vict. ch. 67 (O.), was brought under the control of the Dominion Legislature by 46 Vict. ch. 24 (D.), passed in 1883, before the agreement was executed. By the Act of 1881, amending the Consolidated Railway Act, 44 Vict. ch. 24, sec. 3 (D.), "Every bridge or other erection or structure under which any railway passes existing at the time of the passing of this Act, of which the lower beams are not of sufficient height from the surface of the rails to admit of an open and clear headway of at least seven feet, shall be reconstructed or altered within twelve months from the passing of the Act, so as to admit of such open and clear headway of at least seven feet. Such bridges shall be reconstructed or altered

Com. Pleas.]

NOTES OF CANADIAN CASES.

[Com. Pleas.

at the cost of the company, municipality, or other owner thereof as the case may be," etc.

*Held*, GALT, J., dissenting, that the defendants were not liable for the injury sustained by plaintiff.

*Barron* (of Lindsay), for the plaintiff.

*Osler*, Q.C., for the defendants.

### MCQUAY V. EASTWOOD.

*Surgeon — Malpractice — Evidence — Finding of jury — Circumstances.*

In an action against the defendant, a surgeon, for malpractice, the jury, by one finding, found that the defendant was guilty of negligence in his treatment in not giving instructions to the nurse; and by another, in not seeing that his instructions were properly carried out.

*Held*, that these findings were clearly inconsistent; but their inconsistency would not entitle defendant to judgment in his favour dismissing the action; but, at most, to a new trial, if there was evidence that ought to be submitted to the jury on either branch of the findings; but *held*, that on the evidence the findings could not be supported, and judgment was entered for the defendant, dismissing the action.

*Robertson*, Q.C., for the plaintiff.

### MCEWAN V. DILLON.

*Landlord and tenant — Breach of covenant — Damages, measure of.*

Action by the plaintiff, the lessee, against the defendant, the lessor, for breach of the covenant contained in a lease to dig certain ditches, erect certain fences, and furnish materials for the repair of the house. At the trial the learned judge, in fixing the amount of the plaintiff's damages, held that the measure was the difference between the rentable value of the demised premises with the defendant's covenant performed and the improvements made, and their rateable value without such improvements.

On motion to the Divisional Court, the measure thus adopted was affirmed, CAMERON, C.J., dissenting.

The learned judge at the trial having also directed that if certain improvements were made the damages were to be reduced thereby, and on its being shown to the Divisional Court that these improvements had been made, the damages were accordingly reduced.

*Musgrove*, for the plaintiff.

*Alan Cassels*, for the defendant.

### MCLENNAN V. WINSTON ET AL.

*Contract — Breach — Evidence.*

The plaintiff set up a contract alleged to have been made between the plaintiff and defendants, whereby the plaintiff was to cut and lay down 25,000 railway ties, at twenty-four cents per tie, on the defendants' limit, and were to be delivered thereon: that after the making of the contract the plaintiff procured an outfit to enable him to carry out the said contract, and the plaintiff was put to loss of time in procuring same: that the defendant refused to carry out said contract, whereby the plaintiff sustained damage: that it was further agreed that the plaintiff should ship the outfit to Port Arthur to the care of R., and on arrival of same the plaintiff should report and receive instructions as to the means and way of forwarding the outfit to the defendant's limit, etc.; and that though plaintiff shipped the outfit, etc., the defendants refused and neglected to give the instructions, whereby the plaintiff was damnified.

*Held*, assuming that the contract, as alleged, was proved, the evidence showed that the breach was on the part of the plaintiff and not of the defendant, and therefore the action failed.

*Schoff*, for the plaintiff.

*W. R. Meredith*, Q.C., for the defendants.

### LANDRY V. CORPORATION OF OTTAWA.

*By-law — Application to quash — Single judge — Divisional Court.*

An application to quash a by-law may and ought to be made to a single judge, and not to the Divisional Court, unless some good reason is shown why the latter should entertain it.

*McCarthy*, Q.C., and *Clement*, for the applicant.

*MacLennan*, Q.C., contra.

Com. Pleas.]

NOTES OF CANADIAN CASES.

[Com. Pleas.]

## TODD v. DUN WIMAN ET AL.

*Libel—Mercantile agencies—Privilege.*

The defendants, Dun Wiman & Co., the proprietors of a mercantile agency, wrote to the defendant C., requesting him to advise them confidentially of the standing and responsibility for credit of the plaintiff, stating that he claimed to have been burglarized and to have lost \$1200 to \$1600; asking if this were so, for full particulars, and was there not something wrong? The defendant replied that he had made inquiries and found that the general opinion was that the plaintiff was not robbed at all, and what had been done he had done himself; at all events if he were robbed it was of not more than \$200 or \$300; that circumstances were against him, still he could not say. The defendants, Dun Wiman & Co., subsequently issued a printed circular or notification sheet, in which after the plaintiff's name were the words "if interested, inquire at office." This was published and circulated amongst the defendant's customers in Canada and the United States, some 800, whether they had any interest in the affairs of the plaintiff or not, not more than three or four having any interest. The notification sheet also contained the following: "The words, 'if interested inquire at the office,' inserted opposite names on this sheet, do not imply that the information we have is unfavourable. On the contrary it may not unfrequently happen that our last report is of a favourable character; but subscribers are referred to our office, because, in justice to them, the parties *reported*, and to ourselves, the information can only be properly conveyed to those entitled to receive it by the full report as we have it on our record." The words complained of, namely: "If interested, inquire at the office" were proved to have the effect of injuring the plaintiff. At the trial no attempt was made by C. to prove that the statements made in his letters were true, or that he made inquiry and found the general opinion to be as stated. In an action of libel the jury found for the plaintiff.

*Held*, that the words charged were clearly libellous, and there was no privilege; for, as regards Dun Wiman & Co., the court was governed by *Lemay v. Chamberlain*, 10 O. R. 638, and the explanatory statement did not affect the matter; and as to C., his failure to

prove the truth of the statement, or his belief therein, deprived him of any privilege.

*Ritchie, Q. C., and McGillivray* (of Uxbridge), for the plaintiff.

*Osler, Q. C., and Lash, Q. C.,* for the defendants.

## McCASKELL v. McCASKELL.

*Rent charge, rent service or rent seck—Appointment.*

On 1st December, 1870, A. M. by deed conveyed certain lands to his grandsons, W. M. and D. M., as tenants in common; and on the same day an agreement was made between W. M. and D. M. and A. M., whereby W. M. and D. M. agreed to pay the following sums of money and fulfil the written agreement, namely, that W. M. and D. M. should thenceforward support their mother, M. M., the plaintiff, and furnish her with reasonable, suitable and comfortable board, lodging, and clothing, and medical attendance when required at all times when necessary during the remainder of her natural life; and should treat her at all times with proper respect and regard, and maintain her in proper manner; and, if in the event of any disagreement arising between the said W. M. and D. M. and their mother, so that she would be obliged to leave the said premises, then, they should only be obliged to pay her \$55 a year in lien of board, lodging and clothing and attendance; and that the said payment should be recovered by suit at law if not paid her when due; and that it was thereby agreed and understood that the said covenants payments and annuities should thenceforth be chargeable against the said lands so conveyed as aforesaid. The plaintiff was no party to the agreement. On 4th October, 1872, the defendant W. M., for a nominal consideration of \$1,000, conveyed his undivided half interest to the plaintiff; but of which she had no knowledge. Subsequently on 1st March, 1877, the plaintiff reconveyed the same to W. M.

*Held*, that the agreement did not create a rent charge, as no power of distress was conferred; if a rent service or rent seck there would be a right of distress; but if neither but a covenant charged on land performance of it would be decreed; that upon the conveyance by W. M. to the plaintiff, the whole charge was not extinguished but an apportion-

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NOTES OF CANADIAN CASES.

[Chan. Div.]

ment took place; and the plaintiff was entitled to enforce performance as against D. M.'s undivided interest.

*Rave, Q.C., and McGillivray, of Uxbridge, for the plaintiff.*

*Marsh, for the defendant.*

### CHANCERY DIVISION.

Ferguson, J.]

[June 29.]

#### WATSON V. WESTLAKE.

*Trade mark—Infringement—Word in common use not eligible as trade mark.*

In January, 1885, plaintiff registered as a trade mark, under the Act of 1879, the words, "Imperial Cough Drops," and now sued the defendant for infringement thereof by selling confectionery under the name "Imperial Cough Candy."

*Held*, that inasmuch as the evidence showed that the word "Imperial" as a designation or mark for cough drops or candy was really public property, and a common brand or designation for candy long before the plaintiff's registration, the plaintiff had not the right to endeavour to attribute to that which he might manufacture a name which had been for years before a well-known and current name by which that article was defined, and the action must be dismissed.

*Ridout, for the plaintiff.*

*Frazer, for the defendant.*

Ferguson, J.]

[August 31.]

#### AMBROSE V. FRASER.

*Married Woman—Liability as assign under covenant running with the land.*

On November 23rd, 1872, defendant F. executed a lease of certain lands to the plaintiff and another, covenanting that the plaintiff should be allowed to erect a malt-house on the premises, and that at the expiration or other sooner determination of the demise, F., "his heirs and assigns," would pay the plaintiff the value of the malt-house which in case of disagreement was to be determined by arbitration. The plaintiff erected a malt-house.

Afterwards, in 1878, his co-lessee transferred his interest in the lease to the plaintiff; and during the continuance of the term F. conveyed the land in such manner as that it became vested in him and his co-defendant W. as trustees for his (F.'s) wife, in whom the beneficiary interest was vested at the commencement of this action. It appeared that the marriage of F. and his wife took place in 1849, without any marriage contract or settlement, but that she had separate property at the time of the execution of the lease and had had such ever since, and now had it. After this the lands were sold under a mortgage of date prior to the lease, which absorbed the whole of the purchase money. The present action was now brought against F., Mrs. F. and W. to recover the amount awarded by the arbitrators who had been appointed to fix the value of the malt-house. It further appeared and was urged by way of counter-claim, that a certain sum of \$275 was due from the plaintiff in respect to rent unpaid and certain non-repairs.

*Held*, (1) that Mrs. F. was not liable in respect of her separate estate under the covenant although the covenant was one which ran with the land, and the reversion had in equity been assigned by the covenantor to her during the term and before breach of the covenant. To hold that she was would be to say that the separate property of a married woman married before May 4th, 1859, without any marriage contract or settlement, is bound by a contract made by her husband. For it was not pretended that she made any contract herself or that any credit was given or anything whatever done in respect to, or on the faith of, her separate property or estate. (2) That the \$275 could not properly be set off against the plaintiff's demand, the matters of the two not being in the same right; but the said sum being, owing to the defendants as trustees, whereas the plaintiffs claim was against the defendant F. individually and payable out of F.'s own estate.

*Moss, Q.C., and Barwick, for plaintiff.*

*Osler, Q.C., and Gunther, for defendant.*



Prac.]

NOTES OF CANADIAN CASES.

[Prac]

## PRACTICE.

Q. B. Div.] [Jan. 6, 1885.]

WILSON V. ROBERTS.

*Libel—Costs—Nominal damages—Rule 428  
O. J. A.*

Where in an action of libel a verdict for \$1 damages was found, and the judge at the trial gave no certificate for costs,

*Held*, that the plaintiff was entitled to tax full costs.

The statute 21 Jac. I., ch. 16, having been as to costs in actions of libel, etc., over-ridden by Rule 428 O. J. A., *held* to apply to actions of libel as well as slander, and *Garnett v. Bradley*, L. R. 3 App. Cas. 944, followed.

*H. J. Scott*, Q.C., for defendant.

*Aylesworth*, for plaintiff.

Galt, J.] [June 15.]

COLQUHOUN ET AL. V. McRAE.

*Sheriff—Seizure—Sale—Fees—Poundage.*

A sheriff, under a writ commanding him to levy \$630 and accruing interest out of the goods of the defendant, seized some wheat, but did not remove it or put any person into possession, taking a bond for its safe keeping and delivery to him when demanded. No day for sale was fixed, nor were notices of sale posted or prepared, when the sheriff received a letter from the plaintiff's solicitor, directing him to withdraw the seizure upon payment by defendant of his fees and charges.

The sheriff accordingly notified the defendant of his withdrawal, and obtained payment of \$52, the amount he claimed for fees and poundage, under protest. No money, except this, passed through the sheriff's hands, and he made no levy.

Upon an application to the local judge at Pembroke to compel the sheriff to refund, and upon appeal to GALT, J.:

*Held*, that the sheriff was not entitled to poundage; but he was allowed \$10 in lieu of poundage, and \$8.68 for fees and expenses, and was directed to refund the balance of the \$52.

*Held*, also, that the sheriff was not entitled to retain the amount ordered to be refunded for the purpose of applying it on another execution against the defendant.

*Holman*, for the sheriff.

*Aylesworth*, for the defendant.

C. P. Div. Ct.]

[June 26.]

MACGREGOR V. McDONALD.

*Discovery—Fraud—Subsequent dealings with estate—Examination—Production—Privilege—Solicitor.*

In this action the plaintiff, in her statement of claim, charged her brother, the defendant D. M. McD., with inducing her father to make a will in her mother's favour, with the fraudulent design on the part of D. M. McD. of obtaining the whole estate for himself, and charged that her father was induced to make the will by fraudulent misrepresentations, and that after her father's death, D. M. McD. obtained from her mother a power of attorney to manage the estate, and invested large sums in the purchase of property in his own name and that of his wife, and prayed to have the will set aside. D. M. McD., in his examination for discovery before the trial, admitted receiving the power of attorney from his mother after his father's death, and dealing with the estate under it.

*Held*, that although what took place after the father's death was no proof of the fraudulent design, yet it might throw light upon it, and the plaintiff was entitled to interrogate D. M. McD. upon his examination before the trial, as to whether he had invested the moneys of the estate in his own or his wife's name; but that a general inquiry as to his dealings with each part and parcel of the estate, or as to what property came into his hands under the power of attorney, would be burdensome and oppressive, and should not be permitted. *Parker v. Wells*, 18 Ch. D. 477, considered and followed.

The defendant, D. M. McD., claimed privilege for certain documents in his possession, asserting that he held them merely as solicitor for his mother and co-defendant, F. McD.

*Held*, that D. M. McD. should not have been ordered to produce these documents, without F. McD. being called upon to show cause why they should not be produced.

*W. Cassels*, Q.C., and C. J. *Holman*, for D. M. McD.,

*MacGregor*, for the plaintiff.

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

Cameron, C.J.]

[September 2.]

**McDONELL V. THE BUILDING AND LOAN ASSOCIATION.**

*Costs, scale of—Illegal distress—Injunction—Damages—Subrogation—County Court, equity side of.*

The plaintiff claimed to have it declared that a certain distress made upon his goods by the defendants, under a clause in their mortgage, was illegal and void, that it should be set aside, that an *interim* injunction obtained by the plaintiff to restrain the sale of the goods distrained should be made perpetual, that the plaintiff should be paid \$200 damages for the illegal distress, or in the event of the court holding the distress legal, that the plaintiff should be declared entitled to the defendant's mortgage security to the extent of the value of the goods sold.

The judge at the trial found in favour of the plaintiff, made the injunction perpetual, and assessed the damages at \$25, with full costs against the defendants.

The Common Pleas Divisional Court reversed this judgment, and dismissed the action with costs.

*Held*, that the action was not one that could properly have been brought under the equity jurisdiction of the County Court before the O. J. A. and the Law Reform Act, 1868, although the arrears of rent and the damages found by the judge at the trial were less than \$200; and that the costs should therefore be taxed upon the High Court scale.

D. Armour, for plaintiff.

Alan Cassels, for defendants.

Rose, J.]

[September 7.]

**THOMAS V. STOREY.**

*Examination of plaintiff before trial—Issue of forgery or personation—Ex parte order.*

No order of any moment should be made *ex parte*, except in a case of emergency.

The principal issue was as to a certain instrument upon which the defendant relied, which the plaintiff claimed was obtained either by forgery of the plaintiff's name or by personation of the plaintiff.

*Held*, that no order should be made for the examination of the plaintiff before the trial which would save him from personal attendance and examination before the court and jury.

Holman, for the plaintiff.

Aylesworth, for the defendant.

Armour, J.]

[September 11.]

**TOMLINSON ET AL. V. THE NORTHERN RY. OF CANADA ET AL.**

*Third party—Costs—Indemnity—Rules 107, 108 O. J. A.*

The defendants were sued as carriers for the loss of certain horses which they had contracted to carry from T. to W., partly by their own line, and partly over the lines of other carriers. The loss occurred while the horses were being carried by the C. H. S. T. Co., with whom the defendants had stipulated that all loss in transit should be paid for by the parties in whose custody the loss occurred.

The defendants served notice on the C. H. S. T. Co., claiming indemnity from them as third parties, under Rules 107 and 108 O. J. A., to which the latter appeared, and an order was made, allowing them to intervene and assist the defendants in disputing the plaintiffs' claim against the defendants, and that they should be bound by the result.

The plaintiffs were nonsuited at the trial.

*Held*, that the plaintiffs were not the authors of the litigation with the third parties, and should not be ordered to pay the costs occasioned by adding them as parties.

W. H. P. Clement, for plaintiffs.

Boulton, Q.C., for defendants.

Tilt, Q.C., for third parties.

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

Proudfoot, J.]

[September 21]

MORROW ET AL. V. CONNOR ET AL.

*Fury notice—Qui tam action—Municipal councillors—Trustees—Exclusive jurisdiction of Court of Chancery.*

The action was by two ratepayers of A. on behalf of themselves and all other ratepayers against all the members of the municipal council of A., charging them with continuing with knowledge a defaulting treasurer in office and causing loss to the municipality, and charging fraudulent collusion with the treasurer.

*Held*, that in charging the defendants it was not necessary to use the word "trustees," if, in fact, it appeared that they were trustees, and the law attaches the character of trustees to municipal councillors. The action was one within the former exclusive jurisdiction of the Court of Chancery, and a jury notice was therefore improper.

*Semble*, the municipal corporation should have been made parties, and the action should have been on behalf of all ratepayers, except the defendants.

*W. H. P. Clement*, for the plaintiffs.

*A. H. Marsh*, for the defendants

Proudfoot, J.]

[September 21.]

RE O'HERON.

*Insurance—Benevolent societies—47 Vict. ch. 20 (O.)—R. S. O. ch. 167.*

The statute 47 Vict. ch. 20 (O.) does not apply to benevolent societies incorporated under R. S. O. ch. 167, and not authorized to do business as insurance companies.

*John Hoskin*, Q.C., for infants.

*Hoyles*, for executor.

Chan. Div. Court.]

[September 22.]

RE FLEMING.

*Executor—Compensation—Commission—R. S. O. ch. 107, ss. 37 & 41.*

The judgment of Ferguson, J., reported 11 P. R. 272, and *ante* p. 85, was revised on appeal.

*Per* BOYD, C., who delivered the judgment of the court.—The right to compensation in this case depends entirely upon the statute which declares that a trustee or executor shall be entitled to a fair and reasonable allowance for his care, pains and trouble, and his time expended in and about the trust estate. The statute has fixed no standard by which the rate of compensation is to be measured, and this imports that each case is to be dealt with on its merits, according to the sound discretion of the Judge, who is to regard the care, pains, etc., expended by the claimant. No have the courts laid down any inflexible rule in this regard.

While a percentage has been usually awarded as a convenient means of compensating a class of services which do not admit of accurate valuation, yet the adoption of an hard and fast commission (such as 5 per cent) would defeat the intention of the statute. There was no duty cast upon the applicant by the so-called precatory clauses of the will which required him to act against the interest of his co-executor. In other respects, the right or responsibility which attached upon him compared with his co-executor is not very appreciable, inasmuch as, subject to the charge in favour of the widow, the whole estate was practically at home in the hands of his co-executor on the death of the testator.

The Master's report was therefore restored without costs, as the appellant had failed to show his cross appeal to diminish the sum given by the Master.

*Thompson v. Freeman*, 15 Gr. 384, referred to.

*A. C. Galt*, for the appeal.

*S. H. Blake*, Q.C., and *Goodwin Gibson* contra.

Proudfoot, J.]

[September 22.]

MCBEAN V. MCBEAN.

*Reference—Account—Withdrawing admission*

In the cause of a reference to take partnership accounts admissions of certain items in the plaintiff's account were made by the solicitor for the defendant, G. McB. After the death of the solicitor G. McB. applied to be allowed to withdraw the admissions, swearing that he had not authorized them, and that the admitted items were not properly charged.

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

able against him. No report had been made, and the other parties had not altered their position in any way by reason of the admissions.

*Held*, that so rigid a rule as that a party should never be allowed to withdraw admissions could not be laid down; and G. McB. was allowed to attack the items admitted, they to be regarded as *prima facie* correct, and the onus of displacing them to be upon G. McB.

S. H. Blake, Q.C., for G. McB.

Hoyle, for the plaintiff.

D. W. Saunders, for the defendant, D. McB.

Wilson, C.J.]

[September 24.]

# RE WOLTZ V. BLAKELEY.

*Prohibition—Division Court—Order for imprisonment—Division Court clerk.*

*Held*, that in an order made by a Division Court judge upon judgment summons for payment of the judgment debt within a certain time, a clause directing that the judgment debtor should be imprisoned unless he paid the debt within the time limited was beyond the jurisdiction of the judge; and prohibition was ordered as to that part of the order.

*Seem*, the defendant should have called upon the clerk of the Division Court to show cause against the issuing of any order of imprisonment, as he was the person alone to act upon the order of imprisonment already made.

Reeve, Q.C., for the motion.

Aylesworth, contra.

Mr. Dalton, Q.C.]

[September 28.]

# SHERWOOD ET AL. V. GOLDMAN.

*Writ of summons—Indorsement of plaintiff's residence—Irregularity.*

The words: "This writ was issued by E. F., of —, solicitor for the said plaintiff, who resides at —," in Form 1 O. J. A. mean that the plaintiff's own residence is to be endorsed on the writ of summons, and a writ without such indorsement is irregular.

Small, for defendant.

Beird, for plaintiffs.

Proudfoot, J.]

[September 29.]

# THE BANK OF B. N. A. V. THE WESTERN ASSURANCE CO.

*Discovery of fresh evidence—Opening publication—Powers of trial judge.*

At the trial, June 25th, 1884, Proudfoot, J. (7 O. R. 166), found that the plaintiffs were not entitled to recover a sum of £1,500 sterling from the defendants.

*Held*, that PROUDFOOT, J., now sitting as a single judge in court, had power to entertain a motion to open up the judgment and to put in further evidence, and for a new trial, upon the discovery by the plaintiffs of fresh evidence as to the £1,500; or in the alternative for leave to bring a new action for the £1,500.

*Synod v. De Blaquiére*, 10 P. R. 11, followed.

S. H. Blake, Q.C., for the plaintiffs.

McCarthy, Q.C., and A. R. Creelman, for the defendants.

Mr. Dalton, Q.C.]

[October 1.]

# GILMORE V. TOWNSHIP OF OXFORD ET AL.

*Writ of summons—Indorsement—Claim—Rule 5 O. J. A.*

The writ of summons was issued against three defendants—A, B and C.

The endorsement was that the plaintiff claimed to have declared void a deed from A to B, and a deed from B to A. C was not mentioned at all in the endorsement, nor did it appear in any way upon the writ what the plaintiff claimed against him.

Upon motion to set aside the copy and service upon C,

*Held*, that the endorsement was sufficient under Rule 5 O. J. A., and the motion was refused with costs.

H. F. Scott, Q.C., for the motion.

Caswell, contra.

Prac.]

NOTES OF CANADIAN CASES—CORRESPONDENCE—FLOTSAM AND JETSAM.

Mr. Dalton, Q.C.]

[October 4.

TINNING ET AL. V. GRAND TRUNK RY. CO.

*Notice of trial—Plaintiffs severing—O. J. A.*

Since the Ontario Judicature Act any one of the parties, plaintiffs or defendants, may give notice of trial, if the record be in a state to take it down.

*Aylesworth*, for the defendants.

*Fowler*, for the plaintiffs, R. and J. T.

*MacGregor*, for the plaintiff, T. T.

Ferguson, J.]

[October 11.

MURRAY V. WARNER.

*Discovery—Rule 285, O. J. A.—Examination of assignor by assignee.*

The plaintiff, who was the father of A. S. M., an insolvent trader, sued the assignee and trustee for the benefit of creditors of A. S. M., claiming a declaration of right to rank on the estate for a large sum.

The assignee was instructed by the creditors to resist the claim, and had himself no personal knowledge of the transaction, between the plaintiff and his son, and could find no entry of it in the books or papers of A. S. M. Under these circumstances an order under rule 285 for the examination by the defendant of A. S. M. for discovery before the trial was affirmed.

*J. R. Roaf*, for the plaintiff.

*Holman*, for the defendant.

## CORRESPONDENCE.

*To the Editor of the LAW JOURNAL :*

SIR,—It would be of great convenience to the legal profession if an authorized law list of barristers and solicitors entitled to practise in this Province were published, not only for the use of the profession, but for the use of the commercial laity. If one were published by the 1st January it would give ample time to the profession to pay their fees, and thus prevent their name being omitted, and from this list it could be ascertained who were in good standing. I believe the cost of publication would be more than covered by the sales to the general public, and leave sufficient margin to give a copy with the proceedings of Convocation bound up with it gratuitously to each practitioner. I say, "Give :—" on second thought would not a copy be due to each member as some return for the heavy fees he is generally called on to contribute towards the Law Society? I trust this subject will be considered by the present Benchers of the Law Society, even if at the instance of one of the new blood.

Yours respectfully,

H. W. C. MEYER.

Wingham, Ont., 21st Sept., 1886.

## FLOTSAM AND JETSAM.

BULLUM V. BOATUM.

*(Read before the Cincinnati Literary Club.)*

I was fortunate enough to be present the other evening when a member of the club generously rescued the once famous "Dred Scott" case from being entirely lost and covered up with the dust of contumely and neglect, by pulling out the old thing by the legs and then blowing it out, and white washing it so artistically that for a few minutes it looked as natural as one of the stuffed figures in a museum of curiosities. This has encouraged me to undertake a similar enterprise, viz. : to pull another old case out of the mud and try my skill as an amateur taxidermist. If I can only make the old fossil stand upon its hind legs for a few moments

## FLOTSAM AND JETSAM.

you will recognise its fitness as a pendant to the "Dred Scott" suit.

When I was a boy there was a celebrated legal case, which was at once the wonder and the horror of the age. It was then known as the famous Bull and Boat case, or, to give its legal title, *Bullum v. Boatum*. The facts are these: In the quiet village of Laydown lived Wm. Jones and Thomas Smith. Jones was the owner of a fragile boat, and Smith was the proprietor of a raging bull. One evening Jones, who had been visiting the girl on the other side of the river, tied up his boat to the shore with a hay band, rope being scarce—that is to say, with a band made of hay. An hour afterward Smith's bull came to the river to drink. He, I mean the bull, was frisking his tail in the breeze, with a sort of "does-any-fellow-want-a-horn" sort of an air, and anxious, unlike Mr. Micawber, to turn something up. He suddenly smelt hay, and following his nose he discovered the boat and the hayband.

As a matter of course he tasted this new kind of rope, and he found the ends so succulent that he commenced to eat the coils around the post; and, in order to do this thing thoroughly, he stepped on board the boat. As he bit, nibbled, pulled and chewed, the rope broke, and the next moment the tide (which waits for no man, much less for a bull) carried the boat and the bull into the centre of the river. The bull no sooner felt that his "bark was on the waves" than he tried to kick the boat back again into its place; and, as he plunged away, fore and aft, his hind legs went through the bottom, the boat turned upside down, and, not being able to swim with his legs in the air, he was drowned. In the elegant language of the daily press, he—I mean the bull—"ascended the golden stairs" with a broken boat wrapped around his loins.

Boat and bull were afterward found lying dead on each other's arms—or legs. Then came the suit. Jones sued Smith for the value of the boat, and Smith sued Jones for the worth of the bull. This is the great case of *Bullum v. Boatum*. It was argued fifteen times before a full bench; that is to say, each occupant of the bench was full.

First came the argument for the bull:

"The bull," roared his counsel, "was strictly within his rights. He was exercising his legs in the evening. Hay was his natural food. The right to eat hay was given by Magna Charta. He was suddenly tempted by a delicious hayband, and he did not resist. It was not in the nature or constitution of a bull to resist temptation. He ate that hayband—and in order to eat the whole of it he got into the boat. It was perfectly plain that if the boat had not been there, my client could not and would not have stepped aboard; and then this noble specimen of energy and push could not have

perished"—and so on, and so on, for five days in succession.

Then up rose the great admiralty lawyer on behalf of the boat:

"The bull was palpably in the wrong. Why? The bull went to the boat; the boat did not come to the bull. 'My client' was gently and peaceably floating on the tide of the watery events when this red-headed rake of a bull ate up the anchor and hawser, tore it from its fastenings, jumped in, had a ride for nothing, kicked the bottom out, and died in an attempt to swim with his horns and tail. If ever there was a case of piracy and burglary combined, this was the one, and the bull was the culprit. Look at the natural consequences. The body of that bull floated into the millrace, broke a wheel of the mill; the miller lost his life in trying to pull it out by the tail, and his wife ran away with the constable by way of consolation, and—and—"

Here the chief justice suddenly woke up and said: "I have had enough of this. Take your decree, Brother Bullum. It is the most infamous case of wilful and malicious negligence on the part of the boat that I have ever come across in my professional career. Think of it. A boat tied with a hayband to the shore. Can human turpitude and moral delinquency go further? The bull was within his constitutional rights. He has a natural, inalienable lien upon all hay. The vicious nature of hay is well known. There was a case in the 49,000th report of Ohio Riddles, where a load of hay fell upon a mule and killed him, or her, or it. Bulls, why bulls are sacred animals, known and mentioned in Holy Writ. Popes keep them to this very day in the Vatican. Nearly all bulls are endowed with horns as a sign of martial honours. The statue of Michael Angelo, by Moses, had horns like a bull. I saw them myself. The bull was no sailor, and the boat knew it; and, what is more infamous still, took advantage of his ignorance of navigation, and drowned him with his feet in the air. I feel like giving heavy, yes, punitive damages in this case, as a warning to boats to keep away from bulls."

There is a judgment that is a judgment. This is a case which every lawyer ought to know by heart; it is an inexhaustible mine of legal lore. I regret to add that the Judge died soon after the decision, and that he is still dead.

However, the principle of this case still lives, and those who are without principles can come here and fill up their heads from the once world-renowned case of *Bullum v. Boatum*.

We give this as we find it in several exchanges. At the same time we are under the impression that we saw this amusing skit many years ago.—Ed.

## FLOTSAM AND JETSAM.

A LESSON IN TEMPERANCE.—Just as Justice Coldbath gave the fat man in a short coat thirty days for keeping a calf, three pigs, and a swarm of chickens in his front yard, a citizen in good clothes came into court. That is, his clothes were good, what was left of them. They were torn in a dozen varieties of rent, and dabbled with mud and blood. His broken head was bandaged, his hat was crushed, his face disfigured. O, but old Justice Coldbath was mad. "Well, sir," he snarled, before the citizen could speak, "it's easy enough to see what's the matter with you!" The citizen drew a sigh that sounded like a November breeze, and shook his head despondingly. "Same old story," said the justice: "same old thing. You look like a respectable man now, don't you! You are respectable when you are fixed up, I dare say. Merchant, aren't you. Yes. I knew it. Church member, more'n likely? Yes, I thought so. Stand well in society, and never slipped up before? Yes, sir, I know you. I can pick out your case every time it comes before me. Whiskey, eh? Liquor's the trouble. That's what plays the mischief with your respectable drinker, sir. Brings him to the gutter just as sure as it does the tramp. Now, sir, I'm going to reform you. I'm going to deal justly and harshly and mercifully with you for your own sake. I'll sock it to you, so that you'll never come here again. It's whiskey, you say?" "Yes, sir," said the citizen, feebly; "whiskey is the trouble, sir. But for whiskey I wouldn't appear in this disgraceful, forlorn, painful position. But for whiskey, I would be a sound, happy man, in good, clean clothes, and no headache. But for whiskey—" "That'll do," said the justice, "I know the whole story, and am glad you realize your situation so keenly. Maybe your contrition will take twenty days and \$10 off your sentence, and maybe it won't. Now, then, how much whiskey did you drink, and where did you get it?" "Me!" the citizen said, in a faint tone of infinite surprise, "I never touched a drop of intoxicating liquor in all my life. I am pastor of Asbury M. E. Church, and a drunken policeman assaulted me on the street half an hour ago and nearly clubbed me to pieces. I have just come to file information, and get a warrant for his arrest."

*Pump Court* gives the following:—

In a recent case arising out of a sporting partnership, tried before Sir James Bacon, the learned Vice-Chancellor referred to a case in which a highwayman resorted to law to enforce a claim against another knight of the road in respect of an alleged partnership in a "money or life" business. In the second volume of the English edition of "Pothier

on Obligation" (page 3) a case is mentioned of "Everet v. Williams," which is stated to have been a suit instituted by one highwayman against another for an account of their plunder. The bill stated that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, etc.; that the defendant applied to him to become a partner, and that they entered into partnership; and it was agreed that they should equally provide all sorts of necessities, such as horses, saddles, bridles, and equally for all expenses on the roads, and at inns, taverns, alehouses, markets and fairs. "And your orator and the said Joseph Williams proceeded jointly in the said business with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch, and afterwards the said Joseph Williams told your orator that Finchley, in the county of Middlesex, was a good and convenient place to deal in, and that commodities were very plenty at Finchley aforesaid, and it would be almost all clear gain to them; that they went accordingly and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things; that about a month afterwards the said Joseph Williams informed your orator that there was a gentleman at Blackheath who had a good horse, saddle, bridle, watch, sword, cane, and other things to dispose of, which, he believed, might be had for little or no money; that they accordingly went and met with the said gentleman, and after some small discourse they dealt for the said horse, etc.; that your orator and the said Joseph Williams continued their joint dealings together until Michaelmas, and dealt together in several places—viz., at Bagshot, Salisbury, Hampstead, and elsewhere, to the amount of £2,000 and upwards." The rest of the bill was in the ordinary form for a partnership account. On the 3rd of October, 1725, the bill was referred for scandal and impertinence; on the 29th of November, the report of the bill as scandalous and impertinent was confirmed, and an order was issued to attach the solicitors; on the 6th of December the solicitors were brought into court and fined £50 each, and it was ordered that Johathan Collins, Esq., the counsel who signed the bill, should pay the costs. It is interesting to know that the plaintiff was hanged at Tyburn in 1730, and the defendant at Maidstone in 1735. Wreathcock, one of the solicitors as aforesaid, was convicted of robbing Dr. Lancaster in 1735, but was reprieved and transported. Altogether, it was hardly more creditable to the ingenuity than to the honesty of our learned friend Mr. Collins, that he should have drafted a Statement of Claim, or Bill in Equity as it would be at that time, to settle the dispute between two thieves as to the sharing of the swag. The case deals a blow, too, to a very old proverb that there is "honour among thieves." Mr. Joseph Williams was evidently a gentleman unmindful of the etiquette of his profession, and did not deal fairly with his "pardner."

We think this rather hard on the learned and ingenious Mr. Collins. At least a number of his brethren of modern times should be similarly treated in connection with some of the "big steals" of these days which are quite as villainous as the "stand and deliver" operations of "Gunslow" Heath

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## DIARY FOR NOVEMBER.

1. Mon...All Saints' Day. Sir Matthew Hale born 1609.
2. Tues...First Intermediate Examination.
3. Thur...Second Intermediate Examination.
4. Sun...20th Sunday after Trinity.
5. Tues...Sittings of Ct. of Appeal, and sittings C. C. York for trials, begin. Solicitors' Examination.
6. Wed...Barristers' Examination.
7. Fri...G. T. R. opened from Quebec to Toronto, 1856. W. B. Richards, 10th C. J. of Q. B. 1868.
8. Sat...Last day for filing papers with S. L. S. before call or admission. J. H. Hagarty 12th C. J. of Q. B. 1878.
9. Sun...21st Sunday after Trinity.
10. Mon...Michaelmas sittings of Q. B. & C. P. Div. H. C. J. begin. J. B. Macaulay, 1st C. J. of C. P. 1849.

TORONTO, NOVEMBER 1, 1886.

## MECHANICS' LIENS AND THE REGISTRY ACT.

[COMMUNICATED.]

ONE of the provisions of the Mechanics' Lien Act (R. S. O. c. 120), which has a very important bearing on the proper construction of the Act in its relation to the registry laws, has for some reason or other failed to receive either from the bench or the bar that attention which it deserves. On the contrary, its existence seems to have been generally ignored, if we may properly use so contemptuous a word. At any rate, so far as the reports show, with but one exception, no reference is made to it in any of the cases in which it appears to have had a vital bearing on the question before the Court.

This clause is the last in the Act, and possibly its position may account for its having so generally escaped the attention it deserves. It reads as follows:—"26. Except so far as herein otherwise provided, the provisions of the Registry Act shall not apply to any lien arising under

the provisions of this Act." From the earliest to the latest case which has come before the courts, in which there has been a contest between a lienholder and a registered incumbrancer, with but one solitary exception, it will be found that this important provision is not even mentioned either in the reported arguments of counsel, or the opinions pronounced by the bench; and, for aught that appears to the contrary, these cases were argued and disposed of as if no such provision existed.

The scheme of the Mechanics' Lien Act in its relation to the registry laws we take to be this: The lienholder, by virtue of being employed, is to have a lien binding on the owner and all persons claiming under him, whose rights accrue after the commencement of the work for a certain period without registering his lien, and he is not to be prejudiced on account of the non-registration of his lien during this period by anything contained in the Registry Act. After this period, in order to preserve his lien, he must register it; if he does not, then the provisions of the Registry Act take effect as against his lien. If, on the other hand, he does register his lien within the limited time, then he is entitled to stand in the position of a purchaser, within the provisions of the Registry Act, not only from the date of registration, but from the date the lien first accrued.

We think this position is clear from a perusal of the 2nd, 4th, 6th, 20th, 21st and 26th sections of the Mechanics' Lien Act. By registering his lien within the prescribed time it can never have been intended that the lienholder is to lose a priority he had previously acquired, but



## MECHANICS' LIENS AND THE REGISTRY ACT.

rather that the registration of the lien is to be a means by which that priority is to be preserved and continued.

For the period which intervenes between the date at which the lien first accrues, and the time within which it is registered (assuming the registration to take place within the period prescribed by the Act), the lien is to be dealt with as though the Registry Act did not exist. Any other construction, we think, fails to give due effect to the 26th section.

The earliest reported case in which the effect of the Registry Act in its relation to mechanics' liens is considered is *Douglas v. Chamberlain*, 25 Gr. 288, but that case went off on a question of pleading, the allegations in the plaintiff's bill being held to be insufficient to support his claim. The bill was filed by a lienholder under section 7, to obtain priority over a mortgagee in respect of the increase in the selling value of the mortgaged property occasioned by the lienholder's improvements. The effect of the 26th section upon the point actually involved was not very material. There is, however, a doubt thrown out by the learned judge who disposed of that case as to whether mortgagees, under deeds executed during the progress of the work, would be affected by any notice of lien. Whether he means to doubt whether actual notice of the lien would affect the mortgagee so acquiring title, or merely that the performance of the work would not of itself be notice to the mortgagee, is not very clear. In any case it is clear the solution of the doubt there thrown out, but not attempted to be solved, must depend very largely on the effect of the 26th section, which, however, is not referred to in that case.

The case in which the point in question was first directly raised is *Richards v. Chamberlain*, 25 Gr. 402. This was an attempt on the part of a lienholder to establish his priority over a mortgagee

whose mortgage was dated prior to the lien, in respect of so much of the mortgage debt as had not been actually advanced, until after the accrual of the lien of the plaintiff. The plaintiff in this case failed, but neither in the argument of counsel as reported, nor in the reasons of Spragge, C., for his judgment, do we find the 26th section once mentioned, or its effect anywhere noticed, but the case is argued and discussed as though it had no existence. This case came before the court on motion for decree; the bill alleged that the advances made after the lien accrued were made with notice of the lien, but this allegation was denied by the answer. The plaintiff's counsel, according to the judgment, appears to have relied on the mortgagees having had a constructive notice of the lien, on the ground that they must be assumed to have known that the work was being done in respect of which the lien was claimed. The learned judge (Spragge, C.) held that the plaintiff was not entitled to the priority he sought, and he based his judgment on the fact that the plaintiff had not registered his lien before the advances were made; but notwithstanding the vital importance of section 26, he did not consider in any way the bearing of that section upon the question before him. The decision arrived at may possibly be correct, and we are inclined to think it may be supported on the ground that the mortgagees, having made their advances without actual notice of the plaintiff's lien, had an equal equity with the plaintiff, and having, moreover, the legal title which their mortgage gave them, the maxim that "when the equities are equal the law must prevail" applied, and, therefore, quite irrespective of the Registry Act, the mortgagees were entitled to priority. There may be a difficulty, however, in supporting the judgment even on this ground, arising from the fact that it assumes that the plaintiff's claim is an

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equity, whereas it may be argued that it is a legal right given by statute, and therefore not a right subject to the maxim of equity we have cited; and it might be said that, it being a conflict between two legal rights, therefore the maxim, "*qui prior est in tempore potior est in jure*," should govern; and, therefore, the lienholder should have priority over all advances made by the mortgagees after the lien attached. We are, however, disposed to think the plaintiff's right was really equitable in that case, because he was seeking relief out of an equitable estate, and also claiming to cut down the legal debt created by the mortgage deed to a lesser sum on equitable grounds. But whether the judgment in that case be right or wrong, it is certainly unsatisfactory in that it ignores the 26th section, which has so important a bearing on the question involved.

The next case in which the matter was considered appears to be *Hynes v. Smith*, 5 P. R. 73, reported subsequently on the rehearing before the full court in 27 Gr. 150. It is equally unsatisfactory. That case originally came before Spragge, C. upon appeal from the master's ruling, refusing to add mortgagees as subsequent incumbrancers, but neither in the argument before him nor in his judgment, nor in that of Blake, V.-C. on the rehearing, is any reference whatever made to the 26th section. The only judge who considers the effect of that section is Proudfoot, V.-C., and he dissented from the opinion of Spragge, C. and Blake, V.-C. The case of *Hynes v. Smith* was this. The plaintiff commenced work before 31st December, 1877; two mortgages by the owner were afterwards registered, one on 31st May, 1878, the other 8th June, 1878; the plaintiff registered his lien on the 18th June, 1878. His lien having, as he claimed, attached prior to the registration of either of the mortgages, the usual de-

cree having been obtained to enforce the lien, the plaintiffs applied to the master to add the mortgagees as parties in his office as subsequent incumbrancers. The master ruled that the mortgagees were not subsequent incumbrancers, and refused to add them. Spragge, C., on appeal, sustained this ruling, and upon the rehearing the full court was divided, Blake, V.-C. being in favour of affirming the order, and Proudfoot, V.-C., for reversing it. The order of Spragge, C. was therefore affirmed.

In the judgments of Spragge, C., and Blake, V.-C., we look in vain, as we have said, for any reference to sec. 26.

It may be remembered, that by the original Act of 1873, the lien only came into existence upon the claim being registered. The Act of 1874, however, made an important change in this respect, and gave the mechanic a lien "by virtue of being so employed, etc."; it repealed all acts inconsistent, and enacted that, except as therein otherwise provided, the Registry Act should not apply to any lien arising under the provisions of the Act.

When the statutes were revised, it, of course, became necessary in view of the the Act of 1874, to modify the provisions of the Act of 1873 respecting registration.

That Act had read "no lien under this Act shall exist unless and until" registration; but these words were of course omitted from the Revised Statutes.

Notwithstanding their omission Spragge, C., appeared to think the statute, at all events as to third parties, must still be construed as though they were still there. But here another very important section appears to have been overlooked, and that is section 2, which defines that the word "owner" shall extend to and include a person having any estate or interest, legal or equitable, in the lands upon or in respect of which the work is done, etc., at whose request and upon whose credit, or on whose behalf, or with whose privity

## MECHANICS' LIENS AND THE REGISTRY ACT.

or consent, or for whose direct benefit any such work is done, etc., *and all persons claiming under him, whose rights are acquired after the work in respect of which the lien is claimed is commenced, etc.* The words we have italicized say nothing of registration. The 3rd section goes on to provide that the mechanic is to have a lien not by virtue of registration of his lien, but "by virtue of being so employed;" and the 6th section provides that every lien is to attach upon the interest of the "owner," which word, as we have seen, includes not only the person by whom the mechanic is employed, but all persons claiming under him, whose rights are acquired after the work in respect of which the lien is claimed is commenced.

Any other result than that which the Court arrived at in *Hynes v. Smith* might perhaps appear to work injustice, and it may not unreasonably be said, that to postpone a mortgagee to a lienholder under such circumstances, assuming that the mortgage is taken without actual notice of the existence of the lien, would be a very great hardship. We are disposed to think that it would. At the same time, we are not at present concerned with that aspect of the case. What we desire now to arrive at is, What is the true state of the law on the point? From the sections of the Act we have referred to, we are clearly of opinion that that case ought to have been decided without reference to the Registry Act. For it cannot for a moment be contended that the 26th section, while expressly declaring that the Registry Act shall not apply to liens, nevertheless permits a mortgagee to set up its provisions against the lienholder. The true effect of section 26 is to take mechanics' liens out of the provisions of the Registry Act requiring registration in order to preserve their priority, except so far as the Mechanics' Lien Act itself requires their registration for that purpose.

Dealing then with that case apart from the Registry Act, there is no ground for contending on the facts stated that the lien of the plaintiff was not prior in point of time to the two mortgages, because by the words of the 3rd section it attached, "by virtue of the plaintiff being so employed," and his employment dated prior to the mortgages, and his work was commenced prior to the mortgages, and by the terms of the 6th section, taken in connection with the meaning assigned to the word "owner" by the 2nd section, his lien bound not only the interest of the mortgagor who employed him (as Blake, V.-C., erroneously assumed), but also that of all persons claiming under the mortgagor, whose rights were acquired after the plaintiff's work was commenced.

The judgment of Proudfoot, V.-C., in that case appears to be conclusive, as set out on p. 152.

On the other hand, we cannot agree with Blake, V.-C., as given on p. 151.

How his argument can be reconciled with the words of section 26, which declares that the Registry Act shall not apply, and with section 2, which declares that "owner" includes a person claiming under the person by whom the lienholder is employed, whose rights are acquired after the commencement of the work, we fail to see.

The last case on the subject is *McVean v. Tiffin*, 13 App. R. 1, which was very similar in its circumstances to *Richards v. Chamberlain*, 25 Gr. 402. The arguments of counsel in this case are not reported, but here again, in the judgment of the court, which was delivered by Osler, J. A., we look in vain for any consideration of the effect of section 26. The reasons on which the judgment of the Court of Appeal is based are practically that the Registry Act did apply to the lien and did protect the mortgagee, and a passage from the judgment of Blake, V.-C., in *Hynes v.*

## RECENT ENGLISH DECISIONS.

*Smith*, in which he argues that registration of the lien is necessary to protect the lienholder as against registered incumbrances is cited, apparently with approval. *McVean v. Tiffin* may, equally with *Richards v. Chamberlain*, be possibly supported on the grounds we have suggested, or on other grounds which might be mentioned; but the actual reasons given for the judgment appear to us, with all due deference to the Court of Appeal, quite untenable.

## RECENT ENGLISH DECISIONS.

The English *Law Reports* for September comprise 17 Q. B. D., pp. 413-493; and 32 Chy. D., pp. 525-642.

MASTER AND SERVANT—DEFECTIVE CONDITION OF WAY OR PLANT—EMPLOYERS' LIABILITY ACT, 1880—49 VICT. c. 38 s. 1 (O.).

Proceeding first to the consideration of the cases in the Queen's Bench Division, we think *Thomas v. Quartermaine*, 17 Q. B. D. 414, deserving of attention. The case was one under the English Employers' Liability Act, 1880, 43 & 44 Vict. c. 42, from which 49 Vict. c. 28 (O.) has been adapted. The facts of the case were that the plaintiff was an employee of the defendant in his brewery, and was engaged in the cooling room, in which were a boiling vat and a cooling vat, and between them was a passage which was in part only three feet wide. The cooling vat had a rim rising sixteen inches from the floor of this passage, but it was not protected by any rail or fence. The plaintiff went along this passage in order to get, from under the boiling vat, a board which was used as a lid. As this board stuck, the plaintiff gave an extra pull, when it came away suddenly, and the plaintiff, falling back into the cooling vat, was severely scalded; and for the injuries thus sustained, the plaintiff in the present action sought to recover compensation; but it was held by Wills and Grantham, JJ., that there was no evidence of any defect in the ways, works, or plant of the brewery within the meaning of the Act, and therefore, that the action should be dismissed. The case was

distinguished from *Weblin v. Ballant*, 17 Q. B. D. 122, which we noted *ante*, p. 239, on the ground that in the latter case the ladder was found to be not in a proper condition for the purpose for which it was used, which amounted to a defect in the plant, whereas the court found in the present case that the passage and the vats were in a proper state. Wills, J. says at p. 417:

Now the test whether machinery or plant be defective or not within the meaning of the statute, laid down in the case of *Heske v. Samuelson*, 12 Q. B. D. 30, and adopted by the Court of Appeal in *Cripps v. Judge*, 13 Q. B. D. 583, was whether the machine was fit or unfit for the purpose for which it was applied. The same test must of course apply to a "way," and following that test, I am of opinion that there was in this case no defect within the meaning of sec. 1.

## ASSIGNMENT OF CHOSE IN ACTION—RIGHT OF ASSIGNEE TO SUE.

In *Harding v. Harding*, 17 Q. B. D. 442, the plaintiff claimed to recover from the defendants, who were executors and trustees under a will, a balance appearing to be due to a residuary legatee upon the footing of an account which they had rendered to him, and upon which the legatee had written the following direction: "I hereby instruct the trustees in power to pay to my daughter Laura Harding, the balance shown in the above statement." Notice in writing having been given to the trustees, they at first assented to the assignment, but subsequently refusing to be bound by it, the action was brought by Laura Harding to enforce payment. For the defendants it was argued that the assignment, being of a *chose in action*, was invalid, and could not be enforced because it appeared to have been made without consideration. But the court (Wills and Grantham, JJ.) were of opinion that the assignment was valid, and the plaintiff was entitled to recover under it. With regard to the argument that the plaintiff was a mere volunteer, and therefore, equity would not enforce the assignment in her favour. Wills, J., says at p. 444:

The rule in equity comes to this; that so long as a transaction rests in expression of intention only, and something remains to be done by the *donor* to give complete effect to his intention, it remains uncompleted, and a Court of Equity will not enforce what the donor is under no obligation to fulfil. But when the transaction is completed, and the donor has created a trust in favour of the object of his bounty, equity will interfere to enforce it.

## RECENT ENGLISH DECISIONS.

## EXPROPRIATION OF LAND - COMPENSATION FOR LAND INJURIOUSLY AFFECTED.

On perusing *The Queen v. Essex*, 17 Q. B. D. 447, we find that the decision of the Divisional Court (14 Q. B. D. 753,) which we noted *ante*, Vol. 21, p. 209, has been reversed by the Court of Appeal. The point involved, strange to say, was a somewhat novel one, arising under an Act providing for the expropriation of lands for public purposes. Part of a plot of land laid out as a building estate was expropriated for the purpose of a sewage farm, by reason whereof the value of other parts of the land was depreciated; but these parts, though situate near to the part expropriated, were separated from it by the intervening lands of other owners. Compensation had been allowed by the court below, but the court now decide that although the lands in respect of which the compensation was allowed may have been actually injuriously affected by the expropriation, they were not so injuriously affected within the meaning of the Act as judicially interpreted. The case chiefly relied on by the respondents was the *Stockport Case*, 33 L. J., Q. B. 251, but the court distinguished that case, on the ground that there the land in respect of which the compensation was allowed was a part of the estate of which the land expropriated formed a part without any other land intervening. Lord Esher, M. R., does not hesitate to say that the *Stockport* case should be overruled, and gives the following lucid statement of the legal result of that case :

It appears to my mind to raise this extraordinary proposition, that something to be done under an Act of Parliament by those who have to pay compensation, being necessary to the original object which they are to carry out, and not being the mere subsequent user of the land, if it is not done actually on the claimant's land, although it is done on the very border of his land, is to be taken as not injuriously affecting the claimant's land within the meaning of the Lands Clauses Act; but that if some few feet of the claimant's land are taken, the main body of the land is to be considered as injuriously affected.

## WATER WORKS—HIGHWAY—NUISANCE.

The case *Moore v. Lambeth Water Works Co.*, 17 Q. B. D. 462, was one brought to recover damages for injuries sustained by the plaintiff in falling over a fire plug on the sidewalk. It appeared from the evidence that the fire plug in question had been placed by proper authority in the sidewalk, but that the pavement, which

had originally been on a level with the top of the plug had become worn away, so that the plug projected about half an inch above the level of the pavement, the plug itself being in perfect repair. Day, J., who tried the case, was of opinion that *Kent v. Worthing*, 10 Q. B. D. 118, was in point, and gave judgment for the plaintiff for £600; but on appeal the Court of Appeal (Lord Esher, M. R., and Lindley and Lopes, L.JJ.,) unanimously reversed this decision and dismissed the action, holding that the fire plug, being in good repair and having been lawfully fixed in the highway, the defendants were not liable.

## TRUSTEE IN BANKRUPTCY—IMPROPER REJECTION OF PROOF—COSTS.

The only point necessary to be noticed in *Ex parte Brown*, 17 Q. B. D. 488, is the fact that when the court found that a trustee in bankruptcy, acting under the directions of the committee of inspection, had unreasonably and improperly rejected the proof of a claim tendered to him, it not only reversed his decision, but ordered him personally to pay the costs.

## EASEMENT—PRESCRIPTION—LANDLORD AND TENANT.

Proceeding now to the cases in the Chancery Division, the first which challenges attention is *Chamber Colliery Co. v. Hopwood*, 32 Chy. 1 D. 549, in which the question at issue was the right to the flow of water through an artificial course which had been constructed and enjoyed by the defendants under the following circumstances. In 1834, the defendants demised to the plaintiffs the coal under the C. estate for 50 years, with a right to make drains, etc., for supplying their engines with water, and for draining the demised mines, and any other mines of which the plaintiffs might become lessees of any other persons. In 1836 the plaintiffs became lessees of the O. Colliery from a neighbouring landowner; and in 1846 made a drain about a mile long, chiefly on the C. estate, by which they diverted a small natural stream on the C. estate and brought it down to the O. Colliery, where they made reservoirs for the water at considerable expense. The plaintiffs did not ask leave to make the drain, but the defendants' agent saw the work going on and encouraged it. In 1872 the plaintiffs acquired the fee of the O. Colliery. In 1884, the lease from the defendants having expired, they stopped the drain and diverted the water.

## RECENT ENGLISH DECISIONS.

The plaintiffs, claiming a right by prescription to the water, commenced the action to restrain them. The Court of Appeal (affirming the Vice Chancellor of the County Palatine) held that if the making of the drain was not authorized by the lease (as to which, the court pronounced no opinion), it was made and enjoyed either under the belief of both parties that it was authorized by the lease, or under a comity between landlord and tenant, and that there was no enjoyment "as of right," so as to give the tenant a right to the water after the lease expired.

**TRUSTEE—BREACH OF TRUST—FRAUD OF ONE TRUSTEE  
—FOLLOWING TRUST FUND—PURCHASER FOR VALUE.**

In *Taylor v. Blakelock*, 32 Chy. D. 560, an attempt was made to follow trust moneys which had been misappropriated, into the hands of trustees who had received them innocently without notice of the breach of trust. One Carter, being trustee with the plaintiff under a will, and trustee with the defendant under a settlement, having misappropriated a portion of the settlement fund, applied an equal portion of the will fund to the purchase of stock which he transferred to the names of himself and the defendant. Both the plaintiff and defendant were ignorant of Carter's fraud, and the defendant and the *cestui qui trust* under the settlement had no notice that the stock was purchased with part of the will fund. Carter having died insolvent, the plaintiff thereupon sought to compel the defendant to transfer the stock to him; but the Court of Appeal (affirming the judgment of Bacon, V. C.,) held that the defendant having, by accepting the stock, given up the right to sue Carter for his debt to the trust, was entitled to be treated as a purchaser for value without notice, and was therefore entitled to retain the stock as part of the settlement fund. On the part of the plaintiff the doctrine that an assignee of a chose in action takes subject to all the equities attaching to it was invoked, but Cotton, L.J., as to that argument says, at p. 567:

It is said this Caledonian Railway stock, the transfer of which the plaintiff seeks to obtain, is a chose in action, and that anyone who takes an assignment of a chose in action takes it subject to all existing equities. But that rule applies only to a chose in action not transferrable at law; that is not the rule as regards the right to sue on a bill of exchange or promissory note.

**ADMINISTRATION—FOLLOWING ASSETS.**

In *Blake v. Gale*, 32 Chy. D. 571, the Court of Appeal affirmed the decision of Bacon, V. C., 31 Chy. D. 196, which we noted *ante*, p. 101. The case, it will be remembered, is one in which the plaintiffs as unpaid mortgagees, whose interest had been paid up to 1880, but whose security had since proved worthless, sought to make the residuary legatees of the mortgagor's estate refund the legacies paid them some twenty years ago. The Court of Appeal, in affirming the decision of Bacon, V. C., proceed upon the ground that the mortgagees were aware of the distribution of the estate by the executors, and had acquiesced in it, and that the right they sought to enforce was a mere equity, and that, under the circumstances, this acquiescence debarred the plaintiffs from recovery. Cotton, L.J., says at p. 580:

It must be remembered that the right of the creditors to proceed against the residuary legatees is simply a right given by equity in order that justice may be done. It does not depend on any right against the executor, because, even if the executor has distributed the assets under the decree of the court, so that there is no claim against him, still creditors who come in within a reasonable time and have not in any way barred themselves, retain the right as against the legatees. Here having regard to the knowledge and assent of these creditors, in my opinion it would be wrong to give them relief against the legatees.

**MORTGAGE ACTION—RECEIPTS BY RECEIVER AFTER  
REPORT AND BEFORE DAY FIXED FOR REDEMPTION.**

The Court of Appeal in *Fenner-Fust v. Needham*, 32 Chy. D. 582, affirms the decision of Pearson, J., 31 Chy. 500, noted *ante*, p. 158, holding that when a receiver appointed in a mortgage action receives money in the interval between the making of the report and the day fixed for redemption, the mortgagee is not entitled to the money so received, except upon the terms of bringing it into account, and having a new day appointed for redemption. This delay may, according to the practice prevailing in Ontario, be obviated by giving notice of credit under Chy. Ord. 457.

**MONEY PAID TO TRUSTEE IN BANKRUPTCY IN MISTAKE OF  
LAW.**

Mr. Justice Kay, in *Re Brown, Dixon v. Brown*, 32 Chy. D. 597, by analogy to the cases of *Ex parte James*, 9 L. R. Chy. 609, and *Ex parte Simmonds*, 16 Q. B. D. 308, decided that where money had been paid to a trustee in bankruptcy in mistake of law it must be refunded by him.

## RECENT ENGLISH DECISIONS.

The payment in question was made under the following circumstances: An estate was devised to nine persons as tenants in common, with a power to three of them to sell the whole, to obviate the difficulties of making a partition. W., one of the three, conducted certain sales under the power and retained more than his share of the purchase moneys, and went into liquidation. Further sales were made, and out of the proceeds a further sum was paid to W.'s trustee, in respect of, and in excess of his share, taking into account what W. had previously received. Kay, J., held that W. was not entitled to any part of the purchase money of the subsequent sales until he had made good the sum he had received in excess of, his share, of the proceeds of the previous sales, and therefore his trustee had no right to the money paid on account of the subsequent sales, and he was ordered to refund it.

## POWER — TESTAMENTARY APPOINTMENT — REVOCATION.

The question submitted for the decision of Kay, J., in *Re Kingdom, Wilkins v. Pryer*, 32 Chy. D. 604, was whether a will made expressly in exercise of a special power of appointment contained in a settlement, had or had not been revoked by a subsequent will. The will made in exercise of the power of appointment was made by a married woman in 1866, during coverture. After her husband's death she made three other wills, in the first and second of which she said: "I revoke all other wills," and in the third "I hereby revoke all wills, codicils and other testamentary dispositions heretofore made by me, and declare this to be my last will and testament," and then disposed of all her estate, "including as well real estate as personal estate, over which I have or shall have a general power of appointment"; but she did not in any way exercise or affect to exercise the power in the settlement, nor did she refer to it, nor to the property the subject of the power. For the parties interested in upholding the will of 1866, *In the Goods of Joys*, 4 Sw. & Tr. 214, and *In the Goods of Merritt*, 1 Sw. & Tr. 111, were relied on. But the learned judge considered those cases not to be exactly in point and, relying on *Harvey v. Harvey*, 23 W. R. 478, and *Sotheman v. Derring*, 20 Chy. D. 99, held that the testamentary appointment of 1866 had been revoked.

## ADMINISTRATION SUIT—CREDITOR—COSTS.

Owing to the method of paying costs in administration by an *ad valorem* commission, the point decided in *Re McRea, Norden v. McRea*, 32 Chy. D. 613, is not of so much importance as it otherwise might have been in this Province. The action was brought by a separate creditor on behalf of himself and all other the creditors of a testator who was one of a firm of traders, for a general administration of the testator's estate. The estate proved sufficient to pay the separate creditors in full, but insufficient to pay the joint creditors. Under these circumstances it was held by Kay, J., that the plaintiff was entitled to costs out of the estate as between solicitor and client.

## ADMINISTRATION ACTION—PURCHASE OF CREDITORS' CLAIM BY PLAINTIFF'S SOLICITOR.

The only remaining case we think it necessary to notice is *In re Tillett, Field v. Lydall*, 32 Chy. D. 639, which was an administration action in which the usual accounts had been directed, and upon proceeding before the Chief Clerk it appeared that the plaintiff's solicitor had purchased several creditors' claims for less than their face value. The Chief Clerk reported that the solicitor was a trustee of the creditors for any profit which might be made on the purchase; but North, J., held on appeal, that in the absence of any direction in the order of reference, the matter was not open for the decision of the Chief Clerk, and his certificate was therefore varied accordingly. North, J. says at p. 641:

The question is one between W. H. Tillett (the solicitor) and the other creditors of the testator, and does not affect the estate. It is an equity subsisting between the parties, which any one of them has a right to say should, if dealt with at all, be decided in a formal way. I think that as the objection is taken and persisted in, the question raised can only be decided properly in a separate proceeding.

Q. B. Div.]

NOTES OF CANADIAN CASES.

[Q. B. Div.]

**NOTES OF CANADIAN CASES.**PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.**QUEEN'S BENCH DIVISION.****THE QUEEN v. LYNCH.***Conviction.—Retrospective operation of 49 Vict.  
cap. 49., Can.—Excess of jurisdiction.*

That, notwithstanding it is not so expressly enacted, 49 Vic. cap. 49, Dom., has a retrospective operation upon cases decided prior to the passing of the Act.

That under sec. 7 of that Act the right to *certiorari* is taken away upon service of notice of appeal to the sessions, that being the first proceeding on an appeal from the conviction.

Conviction *held* bad, following *The Queen v. Brady*, that where imprisonment is directed for non-payment of a penalty, the adjudging of a distress of the goods to levy it and then imprisonment, in case the distress proves insufficient, is invalid in law and an excess of jurisdiction.

*T. W. Howard*, for application.

*Clement*, contra.

**REGINA v. HODGINS.**

*Canada Temperance Act, 1878.—Disqualification of convicting magistrate.—R. S. O. ch. 71, s 7—Variance between information and conviction.—Amendment.*

The court refused to quash a conviction under Canada Temperance Act, 1878, on the ground that one of the convicting justices had not the necessary property qualification, the defendant not having negatived the justice's being a person within the terms of the exception or proviso of sec. 7 of ch. 71, R. S. O.

*Held*, also, that it was no variance between the information and the conviction that the former used the expression "disposal," and the latter "sale"; and that, if there had

been, an amendment would have been made under secs. 116, 117, 118 of the first-mentioned Act.

*Clement*, for motion.

*McLaren*, contra.

**REGINA v. McDONALD.**

*Trespass—Obstruction—Right of way.*

S. owned lot 38 in 8th con. of N., containing 200 acres. In 1866 he sold the west half of the lot to complainant, reserving a strip of thirty feet along the north line thereof, as a road for himself and successors in title, to and from the highway at the west of lot 38 to and from the east half of the lot. S. put up a gate at the west limit of the lane, where it meets the highway, which gate had been there from 1866 until removed by the defendants. The defendants were successors in title to S., and removed the gate in question as an obstruction, and were convicted for unlawfully and maliciously breaking and destroying the gate erected at the west end of said road as the property of the complainant.

*Held*, that the defendants were acting in good faith in claiming the right to remove the gate, and under a fair and reasonable supposition of right to do so, and therefore the convictions were quashed.

*Held*, also, following *Regina v. Malcolm*, 2 O. R. 511, that the question of a fair and reasonable supposition of right to do the act complained of was a fact to be determined by the justice, and his decision upon a matter of fact would not be reviewed; but that this rule did not apply where all the facts showed that the matter or charge itself was one in which such reasonable supposition existed; that is, where the case and the evidence were all one way.

*Quære*, whether a gate across a right of way was an obstruction in law.

*Held*, also, that the proviso in sec. 60 of 32 and 33 Vict., c. 22, is to be read as applicable to sec. 29 and to the whole Act.

*Kappele*, for motion.

*Aylesworth*, contra.



Chan. Div.]

NOTES OF CANADIAN CASES.

[Prac.]

## CHANCERY DIVISION.

Ferguson, J.] [Sept. 6.]

JAMES V. ONTARIO AND QUEBEC RY. CO.

*Railways—The "taking"—Compensation.*

In fixing compensation to a landowner for land expropriated by a railway, the rule is, as laid down in *Pierce on Railways*, p. 211, and in *Ontario and Quebec Ry. Co. v. Taylor*, 6 O. R. at p. 348, viz.: to ascertain the value of the land of which it forms a part before the taking, and the value of such land after the taking, and the difference will be the actual value to the owner of the part taken; and "the taking" is properly fixed as at the date of the company giving notice to the landowner of their intention of taking the lands.

It is not correct to say that the value should be taken as of a date prior to knowledge of intention to construct the railway.

Interest is properly allowed to the landowner on the amount of his compensation from the time of the taking to the time of the award.

*Wells*, for the railway company.

*Delamere* and *English*, for the landowner.

Osler, J.A.] Full Court. [Sept. 11.]  
Ferguson, J.]

WILSON V. GRAHAM.

*Will—Construction—Life estate.*

This was an appeal from the judgment of PROUDFOOT, J., in the matter of the construction of the following will: "I do hereby bequeath to my beloved wife, E. K., all the real and personal property that I am possessed of after my funeral expenses and just debts are paid. My wish and desire is that she shall divide the said real estate or personal property, £50 to my eldest daughter S., £50 to my daughter E., the balance to my son W. Provided any more, if a daughter, £50, and if a son, then the balance, £50 to each of my daughters to be equally divided betwixt them after her decease."

The testator died October 15th, 1850, leaving him surviving one son and two daughters,

and his widow, who was then pregnant with another child, who proved to be a daughter, the present plaintiff. The son William died intestate, unmarried, and without issue.

*Held*, that the widow took a life estate under the will in both real and personal property, except what was necessary to pay the legacies to the daughters.

*McCarthy*, Q.C., and *Fitzgerald*, for the plaintiff.

*Bruce*, Q.C., and *Burton*, for the defendant.

## PRACTICE.

Proudfoot, J.]

[May 26.]

RE PLUMB TRUSTS.

*Executor's accounts—Practice.*

Application to the court under R. S. O. c. 107.

One of the trustees of an estate desired to retire from the trusts, and a new trustee had been nominated in his stead under the provisions contained in the deed of settlement of the trust estate. Some of the securities taken over by the trustees under the settlement on assuming office had turned out badly, and considerable loss of capital had resulted therefrom. Consequently, the newly nominated trustee would only accept the position of trustee on the condition that the accounts of the said trust estate up to the time of the transfer of the trust estate to him, as such trustee, should be duly passed before this court by the petitioners, the trustees.

The trustees now petitioned the court to take said accounts, and also to fix the trustees' compensation.

PROUDFOOT, J., ordered a reference to the Registrar of the Chancery Division to take the accounts of the dealings of the said trustees with said trust estate, and in taking such accounts to fix and apportion the compensation proper to be paid to the said trustees respectively for their care and pains in the past management of the said estate.

F. D. and costs reserved.

*D. T. Symons*, for petitioners.

*J. H. Ferguson*, for adult respondents.

*F. W. Harcourt*, for infant respondent.

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

Proudfoot, J.]

[Sept. 21.]

## RE BOUSTEAD &amp; WARWICK.

*Vendor and Purchaser—R. S. O. c. 109, s. 3—Solicitor's abstract—Paper title—Title by possession—Declaration evidence—Affidavit evidence—Viva voce evidence—Title by decree—Specific performance.*

B. agreed to sell certain land to W., and in the agreement it was provided that "the examination of title to be at the expense of the purchaser, who is to call for only those deeds and papers in my possession or under my control." W. demanded a solicitor's abstract which B. declined to furnish, and on the examination of the title it was discovered that a deed was missing which had not been registered, so that a clear paper title could not be made out. B. then offered evidence of a title by possession by declarations under 37 Vict. c. 37 (D.), which W. declined to accept.

*Held*, on an application under the Vendor and Purchaser Act, R. S. O. c. 109, s. 3, that B. was bound to furnish an abstract, and that W. was not bound to accept declaration evidence of the title by possession, and the vendor was directed to obtain affidavits from the declarants when the purchaser could cross-examine the deponents, and if not satisfied with that, although he might be thought unreasonable, the purchaser was entitled to have the evidence taken *viva voce* and have his title sanctioned by a decree, in which case and for that purpose leave was given to him to institute a suit for specific performance, all costs of which were reserved until the hearing.

*Mills*, for the vendor.

*W. M. Hall*, for the purchaser.

Proudfoot, J.]

[Sept. 21.]

## HOSKIN V. THE TORONTO GENERAL TRUSTS CO.

*Railway Co.—Expropriation—Award—Compensation—Price of land taken and depreciation to remainder—Who entitled to on death of land owner—Trustee of real estate or executor—Conversion.*

P., being the owner of certain lands, was served by a railway company with notice of expropriation, and tendered \$3,635 for right of

way and damage, which he refused. Subsequently, on the application of the company, and with the consent of P.'s solicitor, the county judge made an order fixing the amount of security to be given for damages and the price of the land at \$7,300, and giving the company possession upon their paying that amount into a bank to the joint credit of P. and the company. The money was paid in pursuant thereto. An arbitration was then proceeded with, and the compensation to be paid was fixed by the award at \$3,516, being \$924 for the land taken and \$2,592 for depreciation in value to the remaining land. Proceedings and appeals as to the costs kept the matter open, and the money remained to the credit of the joint account until P. died, after making his will, by which he devised all his real estate to a trustee, and his personal estate, after certain specific bequests, to his executors.

The plaintiff proved the will as executor, and the defendants were appointed by an order of court trustees in place of the trustee named in the will. Upon a special case for the opinion of the court as to whether the plaintiff, as executor of the personal estate, or the defendants, as trustees of the testator's land, was or were entitled to the \$3,516, or any part thereof, or who should pay the costs of the case. It was

*Held* that notice to treat was given, a claim made by the landowner refused by the company, money paid into court and possession taken by the company. These circumstances, under the authority of *Nash v. The Worcester Improvement Commissioner*, 7 Jur. N.S. 973, would entitle the landowner to have specific performance against the company, and the result follows that the land was converted into money, and the plaintiff entitled to the \$3,516 and costs of the special case.

*McMichael, Q.C.*, for plaintiff.

*Edgar*, for defendants.

Prac.]

NOTES OF CANADIAN CASES—CORRESPONDENCE,

Mr. Dalton, Q.C.]

[October 18.]

BROMLEY v. GRAHAM.

*Production—Privilege—Affidavit of documents—Criminal libel.*

*Held*, that to obtain privilege for a document, in an affidavit on production, the grounds upon which it is claimed must be stated.

*Held*, also, that a statement in the affidavit that according to the plaintiff's contention the document contained a libel and therefore exposed the defendant to a criminal charge, and did not protect the document; the defendant should have gone further and expressed his belief that the production of the document would expose him to a criminal charge.

*Webb v. East*, 5 Ex. D. 108, followed.

*Holman*, for the plaintiff.

*Douglas Armour*, for the defendant.

Ferguson, J.]

[October 25.]

PICKUP v. KINCAID ET AL.

*Jury notice—Issue—Account—Discretion—R. S. O. ch. 50, sec. 255.*

Where the action was upon a physician's bill for medical attendance, no equitable issue was raised, and it clearly appeared from the pleadings and examination of parties that the only matter really in dispute was the amount of the bill, a judge in chambers exercised the discretion given him by R. S. O. ch. 50, sec. 255, and struck out the defendants' jury notice.

*Hoyles*, for the plaintiff.

*George Macdonald*, for defendants.

Ferguson, J.]

[October 25.]

FOSTER v. MOORE.

*Lis pendens—Vacating registration.*

In an action by a creditor of M. to set aside a conveyance to M.'s wife as fraudulent, the plaintiff registered a certificate of *lis pendens* against the lands covered by the conveyance.

*Held*, that the registration was proper, and that pending the action no order could be made to vacate it.

*Bain*, Q.C., for the plaintiff.

*E. D. Armour*, for defendant.

Wilson, C. J.]

[October 26.]

HALL v. PILZ ET AL.

*Mechanic's lien—Costs, scale of.*

The action was brought to enforce a mechanic's lien for \$142. At the time of the commencement of the action there was registered against the property affected by the plaintiff's lien another mechanic's lien for \$130.

*Held*, that as the aggregate amount of the two liens was over \$200 the action was properly brought in the High Court of Justice, and the costs should be on the scale of that court, and it made no difference that the second lienholder failed to substantiate his claim.

*W. H. P. Clement*, for the plaintiff.

*F. Colquhoun*, for the defendants Conrad.

## CORRESPONDENCE.

## PLEADING A JOINDER OF ISSUE.

*Editor of the LAW JOURNAL:*

SIR,—Under the above heading an article appears in the last number of the *Canadian Law Times*, commenting upon the decision in *Hare v. Cawthrope*, 11 P. R. 353; and as the point decided in that case must arise almost daily in the practice of solicitors, it deserves consideration. The case in question decides that a joinder of issue may be filed by way of defence to a statement of claim or reply to a counter-claim. In order to sustain this decision, two propositions must be admitted or proved, namely: (1) That a joinder of issue is a pleading; (2) That it is equivalent to a statement of defence. The provisions of the Judicature Act are certainly not every explicit in dealing with joinders of issue; and there is a good deal to be said in favour of the negative of both the above propositions. In the definition of a "pleading" given in the Interpretation Clause (sec. 91) of the Act, no reference is made to a joinder of issue, nor is it mentioned in Rule 126, which specifically directs what pleading may be filed by the plaintiff and defendant respectively. It is strange that this rule is not referred to either in the above case or article.

## CORRESPONDENCE.

Rule 126, after providing for the statement of claim, reads as follows:

(a) "The defendant shall, within such time and in such manner as hereinafter prescribed, deliver to the plaintiff a statement of his defence, set off, or counterclaim (if any)."

(b) "The plaintiff may, in like manner, deliver a statement of his reply (if any) to such defence, set off, or counter-claim."

We have in this rule, a specific direction as to the names and order of pleadings, and a joinder is expressly omitted.

In dealing with questions of pleading we have to bear in mind that we can no longer look to the common law rules for guidance. In *Heap v. Marris*, L. R. 2 Q. B. D. 630, Grove, J. says: "In my opinion, it was the intention of the Legislature in introducing a new practice and procedure, to follow as guides the practice and procedure previously existing in the Court of Chancery." This is equally true of the Judicature Act here. Under the former Chancery practice, where a plaintiff wished to simply traverse the facts alleged in the answer, he did so in a pleading called a Replication, but which was framed in the same words as the Common Law Joinder of Issue. Did any one ever hear of filing such a pleading by way of answer to a Bill? The question, however, is not whether a joinder (which states no fact) can now be properly termed a Replication (in the sense in which it was formerly used in Chancery proceedings) and pleaded as such, but whether it can be termed and pleaded as a Statement of Defence, or as a Reply, under the Judicature Act.

The illustrations given by the writer of the article in the *Canadian Law Times*, in commenting upon the judgment in question, are singularly unfortunate; for in the first one he admits the very point which he seeks to controvert, namely, that the plaintiff may, under certain circumstances, join issue upon a counter-claim. And in the second illustration he takes it for granted that a defendant can give evidence of fraud, satisfaction, etc., without setting up such defences in his pleading—a procedure forbidden by Rule 147.

The reasoning of the court in *Harc v. Cawthrope* may be seen by the following extract from the judgment. At page 354, Mr. Justice Rose says: "Order 21, Rule 176, O. J. A., differs essentially in its language from the above section (i.e., sec. 117 of the C. L. P. Act)." It reads:—"As soon as either party has joined issue upon any pleading of the opposite party simply, without adding any further or other pleading thereto . . . the pleadings as between such parties shall be deemed to be

closed without any joinder of issue being pleaded by any or either party."

"In the Interpretation Clause, sec. 91 of the Act, pleading is said to include the statement in writing of the claim or demand of any plaintiff. It seems clear therefore, that a defendant may under Order 21, join issue upon a statement of claim without adding any further or other pleading thereto."

If Rule 176 is to be read in this very literal manner as entitling either party to join issue upon any pleading of the opposite party, and thereby close the pleadings, some curious results must follow.

Under sec. 91, we find that "pleading" shall include any petition or summons. So that if a defendant requires speedy justice, he may join issue the day after he is served with the writ or summons, and, under Rule 255, give notice of trial for the assizes which, perhaps, are fixed to commence within a fortnight. This would be a safe defence to rely upon in cases in which the plaintiff requires evidence to be brought from a distance. The defendant, however, would not have all the advantage of this novel procedure on his side, for all a plaintiff would have to do to rid himself of an awkward summons for security for costs or for particulars, under Rule 425, would be to clap a joinder of issue on the fyles, and give notice of trial for the approaching sittings.

But seriously speaking, if a joinder of issue be pleadable as a defence, then the rules applicable to a defence must govern it. When it is filed by way of defence, to a statement of claim or, reply to a counter-claim, then under *Harc v. Cawthrope*, the pleadings are closed and either party may give notice of trial.

In the case of a counter-claim, what becomes of Rule 153, and the right it gives to defendants to amend on precipe within eight days? Or, in the case of a defendant who files a joinder by way of defence, what becomes of the rights of the plaintiff, who may, under Rule 179, without any leave, amend his statement of claim once at any time before the expiration of the time limited for reply and before replying?

If a defendant rests his defence upon a denial of the facts alleged by the plaintiff, there is no reason why he should not put his denial in some other shape than in that of a joinder of issue.

There are several instances given in the forms which accompany the Judicature Act of all the pleadings authorized by the Act, and among them may be found several denials of the truth in the statement of claim. But I have searched in vain for an instance of a joinder of issue being pleadable as a statement of defence.

## CORRESPONDENCE—LAW STUDENTS' DEPARTMENT.

Is it not possible to read Rule 176 in a less literal but more consistent manner as follows: "As soon as either party, *who is entitled under the rules aforesaid to join issue*, has joined issue, etc."? This reading would harmonize with the former Chancery practice, and also with the other rules and forms of the Judicature Act, and a joinder of issue would once more find itself postponed to a statement of defence.

A. C. GALT.

Toronto, Oct. 20, 1886.

## LAW STUDENTS' DEPARTMENT.

## STUDENT'S CONDUCT OF LIFE.

It is somewhat old-fashioned, though there is plenty of authority for it in our legal literature, to offer general good advice for the student's conduct of life. Such advice is apt to fall upon a dilemma. If you have had the experience on which it is founded, you do not need it; if not, you will not believe it. And after you have forgotten the advice and the adviser, and discovered the truth of things at your own charge, you will say to yourself quite innocently, Why did not some one tell me this before? Yet a few hints of warning and encouragement may fall on kindly soil and ripen. And therefore I would say to the student going forth into the heat of the day, Trust your own faculties and the genius of your University, and beware of the idols of the forum. You will meet those who will endeavour to persuade you that it is "unbusinesslike" to be a complete man; that you should renounce exercises and accomplishments, abjure the liberal arts, and burn your books of poetry. Do this, and the tempters will shortly make you as one of themselves. You will steadfastly regard your profession as a trade; you will attain an intolerable mediocrity, the admiration of crass clients, and the mark of double-edged compliments from the court; you will soberly carry out the rule laid down in bitter jest by a judge who was a true scholar, of attending to costs first, practice next, and principle last; you will stand for Parliament, not as being minded to serve the common weal, but as thinking it good for you in your business; and if you are fortunate or

importunate enough, you may ultimately become some sort of an Assistant Commissioner, or a Queen's Counsel with sufficient leisure to take an active part in the affairs of your Inn, and prevent its library from being encumbered with new-fangled rubbish of foreign scientific books. But if you be true men, you will not do this; you will refuse to fall down and worship the shoddy-robed goddess Banausia, and you will play the greater game in which there is none that loses, and the winning is noble. Let go nothing that becomes a man of bodily or of mental excellence. The day is past, I trust, when these can seem strange words from a chair of jurisprudence. Professors are sometimes men of flesh and blood, and professors of special sciences are not always estranged from the humanities. For my part, I would in no wise have the oar, or the helm, or the ice-axe, or the rifle, unfamiliar to your hands. I would have you learn to bear arms for the defence of the realm, a wholesome discipline and service of citizenship for which the Inns of Court offer every encouragement, and for learning to be a man of your hands with another weapon or two besides, if you be so minded.\* Neither would I have you neglect the humanities. I could wish that every one of you were not only well versed in his English classics, but could enjoy in the originals Homer, and Virgil, and Dante, and Rabelais and Goethe. He who is in these ways, all or some of them, a better man will be never the worse lawyer. Nay more, in the long run he will find that all good activities confirm one another, and that his particular vocation gathers light and strength from them all.

And what is to be the reward of your labour, when you have brought all your best faculties to bear upon your chosen study? Is it that you will have more visible success and prosperity than others who have worked with laxer attention or with lower aims? Is it that the world will speak better of you? Once more, that is not the reward which science promises to you, or to any man. These

\*The Inns of Court School of Arms is well approved by the authority of our old writers on Pleas of the Crown and the office of a Justice of the Peace, who all say that cudgel-playing and such like sports, as tending to activity and courage, are lawful and even laudable. Hawkins (P. C. i. 484) closes a whole *catena* of such authority.

## LAW STUDENTS' DEPARTMENT.

things may come to you, or they may not. If they come, it may be sooner or later; it may be through your own desert, or by the aid of quite extraneous causes. The reward which I do promise you is this, that your professional training, instead of impoverishing and narrowing your interests, will have widened and enriched them; that your professional ambition will be a noble and not a mean one; that you will have a vocation and not a drudgery; that your life will be not less but more human.

Instead of becoming more and more enslaved to routine, you will find in your profession an increasing and expanding circle of contact with scholarship, with history, with the natural sciences, with philosophy, and with the spirit if not with the matter even of the fine arts. Not that I wish you to foster illusions of any kind. It would be as idle to pretend that law is primarily or conspicuously a fine art as to pretend that any one of the fine arts can be mastered without an apprenticeship as long, as technical, as laborious, and at first sight as ungenial as that of the law itself. Still it is true that the highest kind of scientific excellence ever has a touch of artistic genius. At least I know not what other or better name to find for that informing light of imaginative intellect which sets a Davy or a Faraday in a different rank from many deserving and eminent physicists, or in our own science a Mansfield or a Willes from many deserving and eminent lawyers. Therefore I am bold to say that the lawyer has not reached the height of his vocation who does not find therein (as a mathematician in even less promising matter) scope for a peculiar but genuine artistic function. We are not called upon to decide whether the discovery of the Aphrodite of Melos or of the unique codex of Gaius were more precious to mankind, or to choose whether Blackstone's Commentaries would be too great a ransom for one symphony of Beethoven. These and such like toys are for debating societies. But this we claim for the true and accomplished lawyer, that is, for you if you will truly follow the quest. As a painter rests on the deep and luminous air of Turner, or the perfect detail of a drawing of Lionardo; as ears attuned to music are rapt with the full pulse and motion of the orchestra that a Richter or a Lamoureux commands, or charmed with the modulation of the solitary instrument

in the hands of a Joachim; as a swordsman watches the flashing sweep of the sabre, or the nimbler and subtler play of opposing foils; such joy may you find in the lucid exposition of broad legal principles, or in the conduct of finely reasoned argument on their application to a disputed point. And so shall you enter into the fellowship of the masters and sages of our craft, and be free of that ideal world which our greatest living painter has conceived and realized in his master-work. I speak not of things invisible or in the fashion of a dream; for Mr. Watts, in his fresco that looks down on the Hall of Lincoln's Inn, has both seen them and made them visible to others. In that world Moses and Manu sit enthroned side by side, guiding the dawning sense of judgment and righteousness in the two master races of the earth; Solon and Scævola and Ulpian walk as familiar friends with Blackstone and Kent, with Holt and Marshall; and the bigotry of a Justinian and the crimes of a Bonaparte are forgotten, because at their bidding the rough places of the ways of justice were made plain. There you shall see in very truth how the spark fostered in our own land by Glanville and Bracton waxed into a clear flame under the care of Brian and Choke, Littleton and Fortescue, was tended by Coke and Hale, and was made a light to shine round the world by Holt and Mansfield and the Scotts and others whom living men remember. You shall understand how great a heritage is the law of England, whereof we and our brethren across the ocean are partakers, and you shall deem treaties and covenants a feeble bond in comparison of it; and you shall know with certain assurance that, however arduous has been your pilgrimage, the achievement is a full answer.—FREDERICK POLLOCK, in the *Law Quarterly Review*.

## STUDENT'S PRAYER BEFORE THE STUDY OF LAW.

BY DR. SAMUEL JOHNSON.

(September 26, 1765.)

ALMIGHTY GOD, the Giver of Wisdom, without whose help Resolutions are vain, without whose blessing Study is ineffectual, enable me, if it be Thy will, to attain such knowledge as may qualify me to direct the doubtful, and instruct the ignorant, to prevent wrongs, and terminate contention; and grant that I may use that knowledge, which I shall attain, to Thy glory, and my own salvation; for Jesus Christ's sake. Amen.

—Columbia Jurist.

## ARTICLES OF INTEREST, ETC.—FLOTSAM AND JETSAM.

## ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

The unification of the law of bills of exchange.—*Law Quarterly Review*, July.

The effect of mistake on delivery of chattels.—*Ib.*  
Registration of title to land.—*Ib.*

Two offences committed in one transaction (Former jeopardy—Prosecuting for less than the entire offence—Splitting up an act—General rule respecting divisibility—Stealing gas—Theft of several articles from one owner—Articles stolen belonging to several owners—Larceny, forgery, assault, murder, etc.)—*Criminal Law Magazine*, June

Unauthorized sale of liquor by servant—When a defence.—*Ib.*

Accomplices as witnesses (1. Competency, 2. Credibility).—*Ib.*, July.

Liability of officer making wrongful arrest in good faith.—*Ib.*

Taking of life not justified by necessity to prevent unlawful arrest.—*Ib.*

Larceny distinguished from embezzlement, false pretences and breach of trust on the line of trespass.—*Ib.*, August.

The competency, as witnesses, of husband and wife.—*American Law Register*, June.

Life insurance—Death by suicide or self-injury.—*Ib.*

Railway companies as common carriers—Issue of commutation rates—Rights of holders—Duty of company to sell to every applicant.—*Ib.*, July.

Fellow servants—Negligence.—*Ib.*, August.

Libel—Privileged communication—Charges in newspapers read at public meeting.—*Ib.*

Income bonds and mortgages (Definition—Lien on income—Equitable assignment—Distinction between income bonds and common mortgages—Bonds secured by mortgage—Remedies and special conditions—Assignment of fund—Earnings).—*Ib.*, September.

Negligence—Fire from mills.—*Ib.*

Sale of land—Misrepresentation as to quantity.—*Ib.*

Codification.—*American Law Review*, May-June.  
Special interrogatories to juries.—*Ib.*

Privity of estate.—*Ib.*

The security of railroad bonds.—*Ib.*, July-August.  
Origin and policy of wills.—*Ib.*

Are railroads subject to assessment for local improvements?—*Ib.*

Agreements for separation followed by re-cohabitation.—*Irish Law Times*, June 12.

Liability of master for acts of servants contrary to orders.—*Ib.*, June 19.

Common words and phrases (Paper—Store—Strategy—Benevolent and charitable—Book—Crops—Place of burial).—*Albany L. J.*, June 26.

Methods of legal education.—*Ib.*, July 31.

## FLOTSAM AND JETSAM.

A CERTAIN lawyer was compelled to apologize for alleged contempt of Court. With stately dignity he rose in his place and said: "Your Honor is right and I am wrong, as your Honor generally is." There was a dazed look in the judge's eye, and he scarcely knew whether to feel happy or to fine the lawyer for contempt. He began to realize, however, as other judges have, that there is a boomerang tendency in this mode of supporting the dignity of a Court.—*Ex.*

THE shortest and yet the most pointed charge to a jury that has come under our notice is that reported by *The Law Journal* to have been delivered by Mr. Commissioner Kerr, famous for the terseness of his charges, while sitting as assistant judge at Middlesex Sessions. The prisoner concluded his defence by saying, "After all, gentlemen, you have only the prosecutor's word for it that I took his watch." "That is true, gentlemen," said the judge; "but if you believe his word, you will find the prisoner guilty; if you don't believe it, or are in doubt, acquit him. Consider your verdict."

FUGITIVE INK.—A friend of ours is about to make a fortune out of an ink which fades out in a short time, varying with the strength of the preparation, from six weeks down to twenty-four hours. We hazard the prediction that it will fill a long-felt want. Politicians have suffered untold annoyance, and at times a bitterness of soul which amounted almost to repentance, for lack of this invention. Letters written in moments of rash confidence which were not burned as directed have turned up at inopportune junctures to blast their authors. Harmless little transactions of a speculative character, recorded in permanent fluids, have proved "damned spots" which will not "out." It is, however, for its usefulness to the legal profession that we call attention to this ink. Lawyers will earn the gratitude and favour of overworked judges, and materially promote their clients' interest, by writing their briefs

## FLOTSAM AND JETSAM.

in it. On the other hand, a large number of judicial opinions might with advantage be written in it, and the law preserved from precedents which ignore the best settled principles. It is especially recommended for those appellate courts which are in the habit of over-ruling their own decisions at intervals of a few years in a way which gives a new meaning to the bandage on the eyes of justice in allegorical pictures.—*American Law Review*.

THE *Law Journal* (London), referring to the suggestion that the young Prince Edward of Wales might be created Duke of Australia and Earl of Ontario, in celebration of the colonial reunion and of Her Majesty's jubilee, finds that such a title is not altogether unsupported by precedent. "Originally it would seem to have been proper that the place from which a title is taken should be within the realm;" but there are many instances to show that it need only be within the allegiance of the king in right of one of his crowns. Thus the earldom of Tankerville (in Normandy), the marquisate of Dublin, and the earldom of Kilkenny (in Ireland), were in the peerage of England; while the Earl of Llandaff, the Earl of Ely, and Viscount Hawarden were peers in the 'kingdom of Ireland;' and (what is more to the present purpose) there was formerly a Viscount of Canada in the Scottish peerage. It is well known that the Marquis Wellesley aspired to be Duke of Hindostan. Lord Coke (in *Calvin's Case*) expressly says that the Channel Islands are 'no part of the realm of England;' but yet, as they are within the 'dominions' of the Crown, we have an Earl of Jersey and a Lord Guernsey in the peerage of England."

LITIGATION IN ENGLAND.—The *London Times* gives the following statistics of litigation for 1870 and 1884:—

The total number of writs of summons issued in 1870 in the Queen's Bench, Common Pleas, and Exchequer was 72,660; in the year ending October 31, 1884, the corresponding number was 48,747. Including the writs issued in the district registries, the total number was 75,857. That the actual increase should be only about 4 per cent. is a significant fact. Judgments have increased about 21 per cent. But there is no such increase in writs of execution of all kinds, which were 17,725 in 1870 and 20,117 in 1884. It is significant that only 45 special cases were heard in 1884, against 73 in 1870. In the circuit work there has been much fluctuation. On the whole South-Eastern Circuit were entered in 1884 only 110 cases, as against 313

entered on the old Home Circuit. While on the old Northern Circuit only 33 causes were entered in 1870, the numbers for the present Northern and North-Eastern circuits were 354 and 217 respectively. The annual amount recovered by the agency of the Courts for 1870 was 369,503*l.*; in 1884 it was 227,660*l.* The amounts recovered on circuit in these years were 188,509*l.* and 95,822*l.* respectively. The summonses at chambers, which were 52,764 in 1870, were only 39,800 in 1884. Of Chancery business, while the fees paid in the taxing-master's office and the costs taxed were respectively 31,519*l.* and 1,004,660*l.* in 1870, they were in 1883—434,799*l.* and 1,247,016*l.* While the total amounts of cash paid into and out of Court respectively in 1870 were 9,775,517*l.* and 10,296,363*l.*, the figures for 1884 were 12,373,149*l.* and 12,495,421*l.* The purely contentious business, and, in particular, that part of it which devolves on the Queen's Bench Division, seems on the decline, or, at least, has not expanded in proportion to the growth of wealth and population. The returns as to the Admiralty Court are also indicative of decline. During the period which we have selected the work of County Courts has expanded. The plaintiffs entered rose from 912,298 in 1870 to 953,414 in 1884, and the total amount for which they were entered was 2,644,762*l.* in the former year, as against 2,936,820*l.* in the latter. But we are inclined to think that, compared with the advance by "leaps and bounds" in wealth and population, statistics of legal business indicate an arrest in development and a partial atrophy of our Courts.

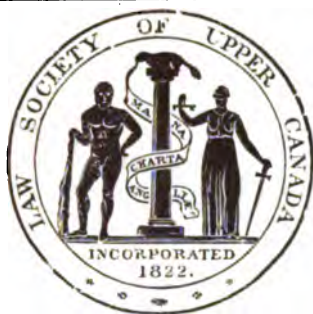
LITTELL'S LIVING AGE.—The numbers of *The Living Age* for the weeks ending October 16th and 23rd contain, The Scotland of Mary Stuart, *Blackwood*; Ernest, King of Hanover, *Westminster Review*; Hero-Worship, *Macmillan*; Alexander Hamilton, *National Review*; Early Newspaper Sketches, *Longman's Magazine*; Musings Without Method, *Blackwood*; Geography, *Nature*; On a Hilltop, *Blackwood*; Some Notes on Fletcher's "Valentinian," *Fortnightly*; The Terrific Diction, *Macmillan*; Wild Bees and Bee-Hunting, *Chambers' Journal*; Liszt's Life and Works, *Fortnightly*; The Influence of Women, *National Review*; Monsieur Gabriel, *All the Year Round*; "Poor Dear Theresa," *Temple Bar*; A Friend of the Family, *Chambers' Journal*; and poetry and miscellany.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price (\$8) is low; while for \$10.50 the publishers offer to send any one of the American \$4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.



## LAW SOCIETY OF UPPER CANADA.

## Law Society of Upper Canada.



## OSGOODE HALL.

TRINITY TERM, 1886.

During this Term the following gentlemen were called to the Bar, namely:—*Sept. 6th*—John Murray Clarke (Honours and Gold Medal); William Smith Ormiston, Edward Cornelius Stanbury Huycke, William Murray Douglas, William Chambers, William Nassau Irwin, George Henry Kilmer, Francis Cockburn Powell, Lawrence Heyden Baldwin, Lyman Lee, Robert Charles Donald, George Hutchison Esten, Thomas Urquhart, Joseph Coulson Judd, Walter Samuel Morphy, John Wesley White, Thomas Johnson, William H. Wardrope, Francis Edmund O'Flynn. *Sept. 7th*.—Thomas Joseph Blain (who passed his examination in Trinity Term, 1885), William Lees, Charles True Glass, Alexander David Hardy, John Campbell, Richard John Dowdall, John Carson, Richard Vanstone, George Edward Evans, Charles Bagot Jackes, William Hope Dean; and *Sept. 17th*, William Robert Smythe (who passed his examination in Hilary Term, 1886). The following gentlemen received Certificates of Fitness to practise as Solicitors, namely:—John Murray Clarke, George Hutchison Esten, Wm. Smith Ormiston, Wm. Chambers, Alex. McLean, Robt. George Code, Henry Smith Osler, Edward C. S. Huycke, Wm. John McWhinney, Wm. Murray Douglas, Chas. True Glass, Robt. Charles Donald, Herbert McDonald Mowat, Francis Edmund O'Flynn, Lawrence Heyden Baldwin, John Bell Dalzell, Lyman Lee, Angus McCrimmon, Ronald D. Gunn, Joseph Coulson Judd, Heber Hartley Dewart, John Wesley White, Alex. David Hardy, Wm. Mansfield Sinclair, Hubert Hamilton Macrae, John Geale (who passed his examination in Hilary Term, 1886, also received his Certificate of Fitness). The following were admitted into the Society as Students and Articled Clerks, namely:—

*Graduates*.—George Ross, John Simpson, George Wm. Bruce, John Almon Ritchie, James Armour, John Miller, Frederick McBain Young, Malcolm Roblin Allison, Robert Baldwin, Charles Eddington Burkholder, Alexander David Crooks, Andrew Elliott, Robert Griffin Macdonald, Thomas Joseph Mulvey, James Milton Palmer, James Ross, John Wesley Roswell, Richard Shiell, Alfred Edmund Lussier, Charles Murphy, George Newton Beaumont, Charles Elliott.

*Matriculants of Universities*.—William Johnston, Samuel Edmund Lindsay, Nelson D. Mills.

*Junior Class*.—Richard Clay Gillett, Alexander James Anderson, George Prior Deacon, Louis A. Smith, Andrew Robert Tufts, William Wright, Kenneth Hillyard Cameron, Harry Bivar Travers, John Alfred Webster, Thomas James McFarlen, William Elijah Coryell, John Henry Glass, Albert Henry Northey, Archibald Alexander Roberts, Charles B. Rae, George S. Kerr, William Egerton Lincoln Hunter, Francis Augustus Buttrey, Frederick Thomas Dixon, Hector Robert Argue Hunt, Daniel O'Brien, Franklin Crawford Cousins, Thomas Alexander Duff, William G. Bee, Stephen Thomas Evans, William Mott, Thomas Arthur Beament, and John Alexander Mather was allowed his examination as an Articled Clerk.

## SUBJECTS FOR EXAMINATIONS.

*Articled Clerks.*

- |                      |   |  |
|----------------------|---|--|
| 1884<br>and<br>1885. | { | Arithmetic.                                |
|                      |   | Euclid, Bb. I., II., and III.              |
|                      |   | English Grammar and Composition.           |
|                      |   | English History—Queen Anne to George III.  |
|                      |   | Modern Geography—North America and Europe. |

Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

*Students-at-Law.*

- |       |   |                                  |
|-------|---|----------------------------------|
| 1884. | { | Cicero, Cato Major.              |
|       |   | Virgil, Æneid, B. V., vv. 1-361. |
|       |   | Ovid, Fasti, B. I., vv. 1-300.   |
|       |   | Xenophon, Anabasis, B. II.       |
|       |   | Homer, Iliad, B. IV.             |
| 1885. | { | Xenophon, Anabasis, B. V.        |
|       |   | Homer, Iliad, B. IV.             |
|       |   | Cicero, Cato Major.              |
|       |   | Virgil, Æneid, B. I., vv. 1-304. |
|       |   | Ovid, Fasti, B. I., vv. 1-300.   |

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

## ENGLISH.

A Paper on English Grammar. Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography North America and Europe.

Optional subjects instead of Greek:

## LAW SOCIETY OF UPPER CANADA.

## FRENCH.

A paper on Grammar,  
Translation from English into French prose.  
1884—Souvestre, Un Philosophe sous le toits.  
1885—Emile de Bonnechose, Lazare Hoche.

## OF NATURAL PHILOSOPHY.

Books—Arnett's elements of Physics, and Somerville's Physical Geography.

*First Intermediate.*

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

*Second Intermediate.*

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

*For Certificate of Fitness.*

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

*For Call.*

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person), to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchers, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:  
Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six

## LAW SOCIETY OF UPPER CANADA.

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchers, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## F E E S .

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above ..	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

## PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890.

*Students-at-law.*

## CLASSICS.

1886.	Cicero, Cato Major.
	Virgil, Æneid, B. I., vv. 1-304.
	Cæsar, Bellum Britannicum.
	Xenophon, Anabasis, B. V.
1887.	Homer, Iliad, B. VI.
	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. VI.
	Cicero, In Catilinam, I.
1888.	Virgil, Æneid, B. I.
	Cæsar, Bellum Britannicum.
	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. IV.
1889.	Cæsar, B. G. I. (vv. 133.)
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. I.
	Xenophon, Anabasis, B. II.
1890.	Homer, Iliad, B. VI.
	Cicero, In Catilinam, II.
	Virgil, Æneid, B. V.
	Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

## MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

## ENGLISH.

A Paper on English Grammar. Composition.

Critical reading of a Selected Poem:—

1886—Coleridge, Ancient Mariner and Christabel.

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Child Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

## HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

## FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886)

1888) Souvestre, Un Philosophe sous le toits.

1890)

1887) Lamartine, Christophe Colomb.

1889)

## OR, NATURAL PHILOSOPHY.

*Books*—Arnot's Elements of Physics; or Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

## ARTICLED CLERKS.

Cicero, Cato Major; or, Virgil, Æneid, B. I., vv. 1-304, in the year 1886: and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, or Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe. Elements of Book-Keeping.

*Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.*

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## DIARY FOR NOVEMBER.

15. Mon...Michaelmas sittings of Q. B. & C. P. Div. H. C. J. begin. J. B. Macaulay, 1st C. J. of C. P. 1849.  
17. Wed...Appointment of election Judges on rota. Ld. Chan. Erskine died 1823, æt. 73.  
21. Sun...22nd Sunday after Trinity. J. Elmsley, and C. J. of Q. B., 1796.  
27. Sat...Michaelmas sittings of Q. B. and C. P. Div. H. C. J. ends.  
28. Sun...Advent Sunday.  
32. Tues...Moss, J. A., appointed C. J. of Appeal, 1877.

TORONTO, NOVEMBER 15, 1886.

## MISTAKES IN BOUNDARIES.

WE are induced by a perusal of the recent case of *Roan v. Kronsbein*, 12 O. R. 197, to come to the conclusion that it would be a very reasonable thing if the courts were empowered, in cases of that kind, to award damages in lieu of giving a judgment for the recovery of the land. The action was brought for the recovery of a strip of land a few inches wide. It appeared that Mrs. Hart, the owner of lot 13, built a house, which, on a survey being subsequently made, was found to encroach seven and a half inches on the adjoining lot 12. The owner of lot 12 and Mrs. Hart then entered into an agreement in the year 1851, whereby it was agreed that Mrs. Hart should not be disturbed during her lifetime, but that on her death the owner of lot 12 should be entitled to claim the part of his lot encroached on. This agreement was never registered. Mrs. Hart died within ten years before the action was brought. The defendant had purchased the house and lot formerly occupied by Mrs. Hart, in ignorance of the agreement made by her, and of the fact of there being any encroachment. The case of the defendant was particularly hard, because, buying as he did, a house that

had been erected for upwards of thirty years, he not unnaturally assumed that it was impossible for any one to object that it encroached on the adjoining lot. Even if the agreement had been registered, which it was not, the defendant would not have been likely to have had notice of it, because he was buying lot 13 and would not, in the ordinary course of business, be likely to examine the title of lot 12 to which the agreement related. In such a case it appears to us that it would be eminently proper that the courts should have a discretion to award damages in lieu of a judgment for the recovery of the land, involving, as the latter would, the destruction of the defendant's building. This principle has been already recognized by the legislature in R. S. O. c. 40, s. 40, whereby the court is enabled, in lieu of awarding an injunction to restrain the breach of a covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, if it thinks fit to award damages to the party injured, in addition to, or in substitution for, such injunction or specific performance. Some provision of that kind, it appears to us, is wanted in reference to actions for the recovery of land.

## MORTGAGEES AND THE STATUTE OF LIMITATIONS.

By the recent decision of the Court of Appeal in *Newbould v. Smith*, 55 L. T. N. S. 194, it has been in substance determined to be the law that a payment to a mortgagee, in order to be sufficient to prevent the Statute of Limitations from run-

## MORTGAGEES AND THE STATUTE OF LIMITATIONS.

ning against him, in favour of the owner of the equity of redemption, must be made by the person entitled to the equity of redemption. The payment relied on in that case had been made by the original mortgagor, but as it turned out that prior to his making it he had assigned his equity of redemption in the mortgaged property, it was held that the payment did not prevent the running of the statute in favour of the owner of the equity of redemption.

This decision makes it apparent that it is unsafe for a mortgagee to suffer his mortgage to remain overdue for a period exceeding ten years, relying simply on the fact of the interest being punctually paid; and even the making of a periodical search to ascertain that no assignment of the equity of redemption has been registered would not obviate the difficulty, because an unregistered assignment of the equity of redemption would be just as efficacious to destroy the effect of a payment by the assignor as though the assignment were registered. It has been gravely suggested that nothing short of taking actual possession within every ten years will absolutely protect a mortgagee from the operation of the Statute of Limitations.

It may be observed that the statute R. S. O. c. 108, s. 22, is altogether silent as to the person by whom a payment, sufficient to prevent the statute from running, is to be made. It simply says:—"Any person entitled to or claiming under a mortgage of any land, may make an entry or bring an action at law or suit in equity to recover such land at any time within ten years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than ten years have elapsed since the time at which the right to make such entry or bring such action or suit first accrued." It will thus be seen that the effect of the judicial interpretation of

this section has been very considerably to narrow the language actually used. There had been a previous decision of the Court of Appeal in the same direction; thus it was held by the Court of Appeal in *Harlock v. Ashbury*, 19 Chy. D. 539, that payment by a tenant of part of the mortgaged premises of his rent to the mortgagee did not keep alive the mortgagee's right as against the rest of the mortgaged premises. As to the particular part in respect of which rent is paid, that of course operates as a taking of possession, but as regards the rest of the mortgaged estate it has no effect. According to Jessel, M.R.:—"Payment within the meaning of the statute must be payment made by a person who is liable to pay," and as the tenant was not liable to pay the mortgage debt or interest, the court said his payment of rent could not be deemed to be a payment on account of of the mortgage debt and interest; although in the ultimate account between the mortgagee and mortgagor the rents received might have to be applied in reduction of the mortgage debt. On the other hand, in *Chinnery v. Evans*, 11 H. L. C. 115, the House of Lords determined that payment by a receiver appointed adversely to the mortgagor was a sufficient payment to prevent the statute running against the mortgagee in favour of the mortgagor. These cases decided that the payment to be effectual to prevent the running of the statute must be made by a person "liable to pay"; but *Newbould v. Smith* appears to us to have laid down a somewhat different rule, by saying that the person paying must, at the time the payment is made, be actually interested in the equity of redemption, and it would seem that "liability to pay" is, after all, if *Newbould v. Smith* is well decided, not necessarily an ingredient; because in that case the assignee of the equity of redemption does not appear to have been "liable

## MORTGAGEES AND THE STATUTE OF LIMITATIONS—RECENT ENGLISH DECISIONS.

to pay" the mortgagee, there being no privity between them, and yet it was because the payment was not made by him that it was held to be ineffectual to stop the running of the statute. We notice that in *Newbould v. Smith Lopes*, L.J., denies that the payment was made by a person "liable to pay." We may perhaps not quite appreciate the sense in which the learned judge uses that term, but it would certainly seem that as the original mortgagor remained liable to pay the mortgage debt, notwithstanding his assignment of the equity of redemption, so a payment by him was a payment by a person who was "liable to pay." It is possible, however, that the learned judge had in view the fact that the mortgagor was only liable on a simple contract for the mortgage debt, and that more than six years had elapsed when the payment in question was made by him; and in that sense was not "liable to pay" had he chosen to plead the statute of limitations.

But perhaps after all the true criterion by which to judge of the sufficiency of a payment as a bar to the statute, is not so much whether it was made by a person "liable to pay," as whether it was made by a person competent to give an acknowledgment of title. This rule is stated both in *Chinnery v. Evans* and *Harlock v. Ashbury*, "payment is not a payment within the statute unless it amounts to an acknowledgment," and judged by that rule the question as to whether the payment was made by a person "liable to pay" becomes immaterial.

Notwithstanding some doubts which have been expressed as to the correctness of the decision in *Newbould v. Smith*, we are inclined to think it is well grounded in principle, and there can be no doubt that it is a decision that mortgagees will do well to keep in mind.

## RECENT ENGLISH DECISIONS.

The *Law Reports* for October comprise 17 Q. B. D., pp. 493-602, and 33 Chy. D. pp. 1-175.

## LANDLORD AND TENANT—DISTRESS—THIRD PARTY.

Proceeding to the consideration of the cases in the Queen's Bench Division, the first which demands attention is *Clarke v. The Millwall Dock Co.*, 17 Q. B. D., 494, in which the Court of Appeal affirms the decision of Pollock, B., that things belonging to a third person which are on the demised premises for the purpose of being wrought up or manufactured by the tenant in the way of his trade are not privileged from distress by the landlord for rent, unless they have been sent or delivered by such third person to the tenant for that purpose. In this case the tenant had contracted with a third party to build a ship for the sum of £8,000. The ship was commenced and nearly completed by the tenant on the demised premises, and all the instalments due on the contract had been paid as they accrued due. The materials for building the ship were supplied by the tenant. The ship was seized in distress for arrears of rent due in respect of the shipyard where the vessel was being built. The court (Lord Herschel, L.C., Lord Esher, M.R., and Fry, J.A.), were unanimously of opinion that it was essential, in order to exempt goods from liability to distress for rent, that they should have been "sent or delivered" to the tenant for the purpose of being dealt with in "the way of his trade or employ," and that as the materials for building the ship in question had been neither sent nor delivered by the person claiming the ship it was therefore not exempt from distress.

## "MAINTENANCE," ACTION FOR—CHARITY.

*Harris v. Brisco*, 17 Q. B. D. 504, is an action in which the plaintiff claimed to recover damages on the ground of the defendant having been guilty of the offence known to the law as "maintenance." The defence was that the defendant had maintained the party in the action referred to out of motives of pure charity. This action had been dismissed, and Wills, J., was of opinion that it had been wantonly and unreasonably brought, and he therefore held that the defence of the defendant having acted from motives of charity formed

## RECENT ENGLISH DECISIONS.

no defence; but on appeal this decision was reversed. Fry, L.J., who delivered the judgment of the court, having after an examination of the dicta of judges and the statements of text writers, come to the conclusion that charity is an excuse for maintenance, and while observing that no case could be found in which the defence of charity had been previously set up in any such action, he proceeds to say at p. 513:—

But if the law be correctly laid down in the passages we have cited, it appears to us to follow that the limitation put on the meaning of the word "charity" by Wills, J., cannot be maintained. He requires that charity shall be thoughtful of its consequences, shall be regardful of the interests of the supposed oppressor as well as of the supposed victim, and shall act only after due, and upon reasonable and probable cause. If we were making new law and not declaring old, it would, in our opinion, be well worthy of consideration whether such a limitation of the doctrine that charity is an excuse for maintenance would not be wise and good. But is it not an anachronism to suppose any such view of charity to have been present to the minds of the judges of the reign of Henry VI.—a view which even now is present only to the minds of a select few, and does not commend itself to a large portion of the kind-hearted and charitable amongst mankind? To say that charity is not charity unless it be discreet appears to us to be without foundation in law.

CRIMINAL PRISONER—IMPRISONMENT UNDER ORDER—  
STATUTORY OFFENCE HOW FAR A "CRIME."

The case of *Osborne v. Milman*, 17 Q. B. D. 514, is useful as throwing light on a question often discussed as to how far a statutory offence can be regarded as a "crime." The plaintiff in the action had been imprisoned under an order made against him upon a summary application for practising as a solicitor without being duly qualified. The defendant, who was the gaoler into whose custody the plaintiff had been committed, treated him as a criminal prisoner—a class of prisoners which a statute defined as being "any prisoner charged with, or convicted of, a crime." The present action was brought for false imprisonment and trespass, and the question was whether under the circumstances the plaintiff was "a criminal prisoner." Denman, J., came to the conclusion that though the offence was one for which the plaintiff might have been indicted and convicted, in which case he would have been "a criminal prisoner," yet as his imprisonment had been ordered upon a summary application without indictment he was not a criminal prisoner.

MASTER AND SERVANT—MISCONDUCT OF SERVANT—  
DISMISSAL OF SERVANT.

In *Pearce v. Foster*, 17 Q. B. D. 536, the Court of Appeal affirmed the judgment of Grove, J., holding that the defendants, who were merchants, were justified in dismissing the plaintiff from their employment as a confidential clerk, before the term of service for which he had been engaged had expired, on the ground of their having discovered that he had been engaged in gambling to an enormous amount in "differences" on the Stock Exchange.

INTERPLEADER—RIGHT OF EXECUTION CREDITOR TO SET  
UP A *JUS TERTII*.

The case of *Richards v. Jenkins*, 17 Q. B. D. 544, is a decision of a Divisional Court, composed of Wills and Grantham, JJ., on an appeal from a county court judge, in an interpleader issue. The question for the court was whether an execution creditor was entitled to defeat the claim of the claimant to certain goods seized in execution, by showing that the claimant had become bankrupt, and that his right to the goods in question had passed to his assignee. The court, after a careful review of the authorities, held, reversing the judgment appealed from, that the execution creditor was so entitled. In Mr. Cababe's book on Interpleader the rule he deduces from an examination of the authorities is "that although the execution creditor can set up a *jus tertii* against the claimant, yet the claimant cannot set up a *jus tertii* against the execution creditor." This view is to a certain extent supported by the present case, and we doubt not that it is the correct rule whenever the goods in question are seized in the possession of the execution debtor. We are disposed to doubt, however, whether that is the rule when the goods are seized in the possession of the claimant, e.g., where goods in the actual possession of A are seized in execution as being the goods of B, in such a case we should be inclined to think A would be entitled to set up a *jus tertii* as against the execution creditor.

If, as Wills, J., puts it in *Richards v. Jenkins*, the decision in that case and in the other cases cited, is in substance a legitimate application of the maxim, *potior est conditio defendentis*, it would seem to follow that the rule stated by Mr. Cababe is subject to the limitation we have suggested.

## RECENT ENGLISH DECISIONS.

## MARINE INSURANCE—NON-DISCLOSURE OF FACTS KNOWN TO AGENT.

*Blackburn v. Vigors*, 17 Q. B. D. 553, is an important decision of the Court of Appeal upon a point in the law of marine insurance. The case was shortly this: the plaintiffs were anxious to secure insurance on a ship which was some days overdue. They accordingly instructed their usual agents to procure the insurance, and in the course of their employment these agents learned some important information casting grave doubts upon the ship's safety. These agents were unable to secure the insurance, and, without communicating to the plaintiffs the intelligence they had received, recommended them to apply to certain other brokers to procure the insurance, which the plaintiffs accordingly did, and through these brokers the insurance on the ship, "lost or not lost," was effected, to recover which this action was brought; neither the plaintiffs nor their agents who actually effected the insurance having any notice of the information acquired by the agents first employed. The defendants contended that the policy was void by reason of the non-disclosure of the information obtained by the agents who were first employed by the plaintiffs. The majority of the Court of Appeal (Lindley and Lopes, LL.J.) held that the policy was void; but Lord Esher, M.R., dissented, agreeing with Day, J., who tried the action. The following passage from the judgment of Lopes, L.J., embodies the views of the majority of the court:—

I fail to see why in principle there should be any distinction between the case where the insurance is effected by the agent who obtained the information, and when it is effected by another agent employed about the insurance. In both cases the assured, by a suppression of what ought to have been communicated to him, obtains an insurance which he would not otherwise have got. The underwriters are as much misled in the one case as in the other. In both cases there is a misconduct on the part of the agent of the assured; in both cases the underwriters are free from blame. It seems to me unjust and against public policy that a person through whose agent's fault the mischief has happened, should profit to the detriment of those who are in no way in fault.

On the other hand, Lord Esher, M. R., while strenuously denying any legal duty on the part of the agent to have communicated the information to his principals, as to the argument founded on public policy, observes, at p. 570:—

It seems difficult to see how public policy can be affected by any circumstances relating to the

power between the parties of enforcing or repudiating a contract of insurance any more than of any other contract; and, secondly, it seems difficult to reconcile the interference of the doctrine of public policy in the case of a contract of insurance on ship or goods, lost or not lost, one step beyond affirming that the parties who are allowed by law to enter into this hazardous and well-nigh gambling speculation of whether a loss has or has not already happened, must be equally informed, or equally ignorant.

## PRACTICE—SERVICE OF WRIT OUT OF JURISDICTION—ORDER LIMITING PLAINTIFF'S RIGHT TO RECOVER AT THE TRIAL.

*Thomas v. Hamilton*, 17 Q. B. D. 592, is a decision of the Court of Appeal on a point of practice. The defendant having applied on motion to set aside an order authorizing the service of notice of the writ out of the jurisdiction, on the ground that the cause of action was not one in which the writ could properly be served out of the jurisdiction: the judge who heard the motion, being doubtful on the affidavits used, whether or not there had been any breach of the contract sued on within the jurisdiction, refused the application, but ordered that the plaintiff's claim should be limited to the recovery of the price of goods in respect of which it might appear at the trial, that the writ could have been properly served out of the jurisdiction. The Queen's Bench Divisional Court had set aside this order, but the Court of Appeal held that it was rightly made.

## LARCENY—ORDERING RESTITUTION OF PROCEEDS OF STOLEN GOODS (32 &amp; 33 VICT., c. 21, s. 113, D.).

In the case of *The Queen v. The Justices of the Central Criminal Court*, 17 Q. B. D. 598, a Divisional Court composed of Lord Coleridge, C.J., and Cave, J., determined that, under the Imperial Statute, 24 & 25 Vict., c. 96, s. 100, (from which the Canadian Act, 32 & 33 Vict., c. 21, s. 113, is taken, and which provides for restitution of stolen property), the court may not only order restitution of the stolen property in specie, but may also order the payment over of the proceeds of it, where it has been sold. As to the manner in which this jurisdiction should be exercised, it may be useful to refer to the following observations of Lord Coleridge:—

An application for the restitution of property stolen or obtained by false pretences is rightly made to the court before which the felon or misdemeanant is convicted: and, if the goods have been sold, an application may be made for restitu-



## RECENT ENGLISH DECISIONS.

tion of the proceeds, which, if they are in the hands of the criminal or of an agent, who holds them for him, it should be granted. If the person holding the proceeds does not hold them for the criminal, it should not be granted.

The question came before the court, upon motion for a *certiorari*, and it was objected that the order in question was wrong in point of law; but the learned Chief Justice points out that that is an objection which can only be taken by way of appeal, and not upon application for a *certiorari*, on the ground of excess of jurisdiction.

A discussion of some other questions affecting the restitution of stolen property will be found *ante*, vol. 19, p. 198.

## PRIORITY BETWEEN EQUITIES—NEGLIGENCE—SEAL.

Turning now to the cases in the Chancery Division, *The National Provincial Bank of England v. Jackson*, 33 Chy. D. 1, demands a passing notice. This action was a contest for priority between a mortgagee by deposit and the beneficial owner of the estate, who had, through the fraud of the mortgagor, been induced to execute a conveyance to him of the property affected by the mortgage, and the Court of Appeal held that the mortgagees, having had constructive notice of the fraud, were guilty of negligence, and that they must, therefore, be postponed. It was also determined, that although a legal mortgage cannot be postponed to a subsequent equitable mortgagee, on the ground of any mere carelessness or want of prudence, yet this rule does not apply as between two equitable claims. A question also arose, whether a deed of reconveyance executed by the mortgagor to the defendants was a valid deed, it having only a ribbon to which the seal is usually affixed, but not any seal or impression; and it was held that the deed was invalid for want of a seal.

## COMPANY—CONTRACT WITH TRUSTEE FOR INTENDED COMPANY—RATIFICATION.

In *re Northumberland Avenue Hotel*, p. 33, Chy. D. 16, a written agreement was entered into between W of the one part and C as trustee for an intended company to be called the N. Company of the other part, whereby it was agreed that W, who was entitled to a building lease, would grant an under-lease to the company, and that the company should erect buildings. The company was registered

on the following day. The articles of incorporation adopted the agreement made by W with C, and provided that the company should carry it into effect. No fresh agreement with W was signed or sealed on behalf of the company, but the company took possession of the land, expended money in building on it, and acted on the agreement which they considered to be binding on them. The company having failed to complete the buildings, the original lessors of W re-entered, and the company went into liquidation. In these liquidation proceedings W claimed damages against the company for breach of the agreement; but it was held by the Court of Appeal (affirming Chitty, J.) that the agreement having been entered into before the company was in existence, was incapable of ratification by the company, and that the acts of the company having been done under the erroneous belief that the agreement between W and C was binding on the company, were not evidence of any fresh agreement having been entered into between the company and W on the same terms as the agreement between W and C, and therefore, W could not succeed.

## RECTIFICATION OF AGREEMENT—MONEY PAID UNDER PROCESS OF LAW—RES JUDICATA.

*Caird v. Moss*, 33 Chy. D. 22, is a case deserving attention. The plaintiffs had built a ship for B, and a considerable sum had remained due to them for the price, for which they had a lien on the ship. The defendant made advances to B, and an agreement was entered into between the three parties that the plaintiffs should sell the ship, and pay the defendant and themselves the amounts due out of the proceeds. The agreement was obscure, and left it doubtful whether or not the plaintiffs were entitled to pay themselves in priority to the defendants. The ship was sold, and the defendant sued the plaintiffs for an account of the proceeds; in this action the plaintiffs made no claim for a rectification of the agreement, and it was held that, according to its proper construction, the defendant was entitled to be first paid. The plaintiffs paid the defendant in accordance with the order of the court, and then brought the present action to have the agreement re-formed. The defendant pleaded that the agreement had been executed, and the money paid, under the order

## RECENT ENGLISH DECISIONS—CRITICISING JUDGES.

of the court and that the plaintiff was, therefore, entitled to no relief. Kay, J., held that the plaintiff was entitled to proceed with the action, on the ground that it was not *res judicata*; but the Court of Appeal reversed this decision, holding that, although it is true the case was not *res judicata*, yet that the plaintiffs might have set up the claim to have the agreement re-formed before the action brought against them by the defendant was concluded, and not having done so, they were now too late, and the action was, therefore, dismissed.

Cotton, L.J., says at p. 34:—

Now was it open to the present plaintiffs to raise this question during the pendency of the former suit? Clearly it was. They might not have been able to raise it in that action, but they might have commenced an action for the purpose, and the court would not have disposed of the former action while the new one was pending. It would be against the principles on which Courts of Equity act, to allow an action for rectification to be commenced at so late a stage as that at which the present action is brought. . . . Here, nothing remains to be done under the contract, if it should be varied. Mr. Hastings suggested that, if it were rectified, the plaintiffs might bring an action for damages. I think there is nothing to give the plaintiffs such right of action. The defendants obtained in the former action a judgment which was right on the materials then before the court, and the present is an attempt to get back money paid under a judgment, which is not impeached for fraud, and, in my opinion, such an action cannot be allowed to proceed. I agree with Mr. Justice Kay, that there was no *res judicata*; but an attempt to re-form a spent agreement, and recover the money which has been paid under it, cannot be allowed.

## LUNATIC—MORTGAGE OF LUNATIC'S ESTATE TO PAY ANCESTOR'S DEBTS.

The only other case to be noted is *In re Fox*, 33 Chy. D. 37, in which the Court of Appeal authorized the committee of a lunatic, who was entitled to a moiety of an estate in fee, to join in a mortgage with the owner of the other moiety for the purpose of raising a sum of money to pay off certain debts of the lunatic's ancestor, for which the land was liable; but directed the mortgage to be framed so that the lunatic's moiety should only be liable for a moiety of the mortgage debt and interest, and so that it should not be liable for any default of the co-owner of the estate in payment of the other moiety of the principal and interest; and the court declined to authorize the committee to enter into any covenant on behalf of the lunatic for payment of either the principal or interest of the mortgage debt.

## SELECTIONS.

## CRITICISING JUDGES.

We reprint by request an article entitled "Are judges above criticism," and find no difficulty in answering the question. If ever there was a "divinity that doth hedge a" judge, and secure him against public animadversion, that protection has surely been withdrawn. The privilege is now freely used by the press and the public, of criticising not only the formal and *ex-cathedra dicta* of the courts, but their minor and incidental rulings and every exercise of that elastic and indefinite power denominated judicial discretion. And this is as it should be. There is no reason why judges should not be held to a responsibility to public opinion not less stringent than that of political officers. Indeed, as judges hold their offices, if not by a life tenure, at least for a long term of years, and as their removal from office can rarely be effected by impeachment or otherwise, and only in cases of flagrant offences, the reason is stronger for their responsibility to public sentiment, than for that of the political officer who must needs face his constituents, within a year, or two, or three, and stand or fall upon the account he can then give of his stewardship.

Of course we will not be understood as saying that judges should be swerved or controlled in their judgments by popular sentiment. On the contrary, quite the reverse. They should declare the law; and administer justice irrespective of all outside influences. While their duty in this respect is plain, the right of the public to criticise and discuss their performance of it is equally clear. In many minor matters however, judicial notice may well be taken of lay criticism. If a judge is too slow, permits unnecessary delays, allows cases to go over from term to term, or if he falls into the opposite error, forces counsel to premature trial of their cases, and thereby produces a plentiful crop of appeals, writs of error and reversals, it is well that his fault should be fully ventilated in newspapers or anywhere else. And if a judge is tyrannical or peevish, or impatient, any one may well say so. In England, lately,

## CRITICISING JUDGES—LIBEL—PRIVILEGED COMMUNICATIONS.

a judge upon the bench took exceptions to the conduct of a solicitor, lost his patience, which seems however to have been no very great loss, and fell to scolding like a very Billingsgate fishwoman. The principal legal journals of London commented in unmeasured terms on the scandalous scene, and in the name of the profession, tendered their sympathy to the aggrieved solicitor. Upon faults such as these, and they are not uncommon, the public may and should comment freely, but if a judge honestly and faithfully strives diligently to do his whole duty, he is entitled to the commendation of the community, however distasteful to the feeling or adverse to the interests of the people his rulings may be. The recent proceedings in California against the judges of the Supreme Court of that State, upon which we commented some weeks ago, is a striking illustration of the extremes to which a people may be carried by an adverse ruling on a point of great public interest. Not only was the legislature convened in extra session for the avowed purpose of repealing out of office the Judges who made the obnoxious decision, but charges of imbecility, physical and mental, were preferred against two of the judges in aid of the nefarious project of removing from office, judges confessedly upright because they expounded the law the way they understood it. Judges ought to be subject to fair criticism of their official acts, but surely they should hold their offices free from such perils as those which environed the California judges.—*Central Law Journal*.

## LIBEL—PRIVILEGED COMMUNICATIONS.

The following are the head notes of two cases reported in the *American Law Register* for August last:—

*Briggs v. Garrett*.—Citizens and voters have the constitutional right publicly to discuss and canvass the qualifications of candidates for public office, and information honestly communicated by one citizen to others at a public meeting, to the effect that a candidate for such office had been charged by a reputable citizen with grave misconduct, is a privileged communication, and the person communicating such information is not liable to an action

for libel therefor, although the charge was false in fact and its falsity could have been discovered by inquiry.

Such communication being privileged, legal malice is not inferrible, and on the trial of a civil action for libel against the party who made the communication the court is justified, in the absence of proof of actual malice, in entering a nonsuit.

The fact that reporters of the public press were present at the meeting at which such privileged communication was made is immaterial.

At a meeting of a body of citizens of Philadelphia, styled the "Committee of One Hundred," assembled for the purpose of considering the merits of candidates for public office, a letter reflecting severely upon the character of one of the judges of the Common Pleas, who was a candidate for reelection, by statements subsequently acknowledged to be wholly untrue, was, by order of the chairman read by the secretary, and appeared at length the following day in the daily papers. *Held*, that the communication being based upon probable cause, was proper for discussion at such a meeting, and the court will not reverse a judgment of nonsuit entered in an action for libel brought against the chairman of the meeting.

*Bronson v. Bruce*.—Charges of crime, which are false, made in a newspaper against a candidate for Congress, though made without malice and in an honest belief of their truth, are not privileged communications; but if they were published in good faith, after reasonable and proper investigation, this fact may go to mitigation of damages.

The editor then discusses them as follows:—

The above cases form an important addition to the literature upon the interesting question therein discussed. In the case of *Express Printing Co. v. Copeland*, recently decided by the Supreme Court of Texas, and reported in 24 Am. Law Reg. (N. S.) 640, the rule was laid down, that where a person consents to become a candidate for public office conferred by a popular election, he should be considered as putting his character in issue so far as respects his qualifications for the office; and that whatever pertains to the qualification of the candidate for the office sought is a legitimate subject for discussion and comment; but statements and comments made must be confined to the truth, or what in good faith and upon probable cause is believed to be true, and the matter must relate to the suitability or unfitness of the candidate for the office.

## LIBEL—PRIVILEGED COMMUNICATIONS—THE EVILS OF CASE-LAW.

A careful study of that case convinced us of its correctness and it is unnecessary to repeat what we there said. The principal case of *Briggs v. Garrett* lays down substantially the same doctrine as the case above referred to, and we do not understand the dissenting judges to question this principle. Their contention was only that the question of good faith, belief in the truth of the statement and the existence of actual malice, were questions for the jury. Mercur, J., said: "It may be asked, are the people to be prevented from criticising and discussing the conduct, character and qualifications of a candidate for office? Undoubtedly they are not. They must, however, confine themselves within the limits of truth, or permit a jury to pass upon their good faith and motive when they make a false charge:" *Starkie, Slander* 110.

The case of *Marks v. Baker*, 28 Minn. 162, referred to by the court in *Briggs v. Garrett*, is of more than ordinary interest in this connection. In that case the plaintiff was treasurer of the city of Mankato, and a candidate for re-election. The defendants, being residents and tax-payers of said city, published a communication in a newspaper published in said city, of which they were editors and proprietors, charging or insinuating that the plaintiff had, as appeared by certain official reports, failed to account for city funds which had come into his hands as such treasurer, and that (as plaintiffs claimed) he had embezzled a portion of such funds; and it was held that such publication, if made in good faith, was privileged.

The case of *Crane v. Waters*, 10 Fed. Rep. 619, also supports the doctrine of *Briggs v. Garrett*. In that case Lowell, J., said: "The modern doctrine, as shown by the cases cited for the defendants, appears to be that the public has a right to discuss, in good faith, the public conduct and qualifications of a public man, such as a judge, an ambassador, etc., with more freedom than they can talk with a private matter or with the private conduct of any one. In such discussions they are not held to prove the exact truth of their statements, provided they are not actuated by express malice, and that there is reasonable ground for their statements or inferences, all of which is for the jury."

With reference to the principal case of

*Bronson v. Bruce*, it seems to us that the learned judge who tried the case at *nisi prius* made a very clear and concise statement of the law as it seems to be established by the weight of modern authority. It seems to us that the learned judge who delivered the opinion of the appellate court has drawn a picture of the evils flowing from the rule laid down in the court below, rather more lurid than the facts will warrant. He says, "Under such a rule the advocates of both or all candidates would let fly their poisoned shafts of defamation and charges, to be met by counter-charges, until the bewildered voter, not knowing who or what to believe, must of necessity shut his eyes to the fitness and character of the candidates and join the ranks of the party whose banner bears the inscription 'Principles not men?'" Qualified as is the doctrine of the court in this case by the rule relating to the mitigation of damages, it is, on grounds of public policy, impossible to deny that it is a reasonable rule; but the old rule laid down in the case of *King v. Root*, and other similar cases approved by the court in the principal case, is one which, as it seems to us, will not ultimately prevail in this country; and we are not aware that a more satisfactory state of morality on the part of the public press exists in New York and other States adhering to that doctrine than in Pennsylvania, Minnesota, and other States adopting the rule laid down in *Briggs v. Garrett*. Upon the whole, it seems clear that the weight of modern authority supports the rule laid down in *Briggs v. Garrett*, and that so long as trial by jury is preserved, there is no immediate danger of the subversion of the social fabric from the general adoption of the rule of this case.

## THE EVILS OF CASE-LAW.

ONE evil connected with modern law practice, which has been much commented on of late years, and which is universally admitted to exist, may be defined as case-law practice. And while I do not entertain any such chimerical idea, as to suppose that this association can do much towards the abatement of this evil, it is still true that the best way by which to

## THE EVILS OF CASE-LAW.

secure its abatement, is to understand fully how and why it arose, how it has come to be what it is—so that having learned thus much, we will be in a position to create, or aid in creating, a public sentiment adverse to it, such that those who are competent to deal with it, and have more or less power to control it, shall be stimulated to take it in hand.

Much and perhaps most of our modern law is judge-made law, by which I mean, that it rests for its original authority on decisions of the courts, rather than on statutory legislation. In such judge-made law, I include for my present purpose—though perhaps not with the utmost accuracy—the larger part of what we know as the common law of ancient date, and also those customs and usages which originate in the growth and development of our modern civilization, and which the courts necessarily adopt as governing rules in fixing the rights of parties who may have acted thereunder. I also include in the term judge-made law, those requirements of the law which result from the application of common law or other necessary rules of construction to the large body of statutes which emanate from our legislative bodies. As is well-known, and as is often necessarily the case, such statutes are unintelligible or ambiguous, or even contradictory, unless resort be had to extraneous or outside sources for aid in ascertaining their meaning. And when such aid is called in, as it often must be, then a new body of law is created with which the skilful practitioner must to a greater or less extent familiarize himself.

Now the work of the lawyer, in part, is to apply the law of the land, whether it be statutory or judicial law, to the facts of his case, provided there be any settled law applicable thereto; and if there be not, then to secure, if he can, the creation of new or hitherto unmade, or at least unformulated law, such as will be best, and most effectually protect or vindicate the just rights of his client, and in doing so, promote the ends of justice. In either case two courses are open to him: one is to keep in mind the principles of right and wrong which theoretically, at least, underlie all law, and apply those principles to the facts under consideration, and thereby seek a righteous verdict of adjudi-

cation. In this work previous decisions, in so far as they apply, are an obvious, important and desirable aid, for the reason that they indicate the conclusions which previous judges have reached on the consideration of like questions, under conditions presumptively, at least, favourable to a just decision.

The other course is, to leave out of consideration entirely, or give but little weight to the underlying principles of right and wrong, and to look through prior decisions to see if one or more cannot be found which, either in the plain meaning of the language used, or by a distortion, or perversion, or stretching of such language, will secure a favourable result. This latter course is one that commends itself to certain classes of practitioners:

1st. To the new beginner, especially if he feels, as he naturally may, a little timid or distrustful of his ability to argue his case on its merits.

2nd. To the lazy practitioner, for it is much easier to read up what the judges have decided, and to make a real or fanciful application of such decisions to the case in hand, than it is, by extensive reading, hard study, diligent application and close reasoning, to convince the court of the justness of the case presented.

3rd. Case-law practice also commends itself to those members of our profession, of whom I am sorry to say there are some—though none perhaps in Pittsburg—who care little or nothing for a just decision, but who look only to winning the case. And in this class I include the dishonest, unscrupulous and tricky practitioner—the *shyster*, in short—and also the practitioner who works only for fees.

And right here I may say that, in my opinion, a lawyer who works only for fees is neither a good lawyer nor an honest man. Such I believe to be, in part, the origin of the evil of case-law practice. And the remedy thus far is easily suggested:

1st. To discountenance the lazy and to compel them, if possible, to argue cases on principle, rather than on authority, which, of course, only the courts can do; and still further, to train them while students, so that they shall learn sound principles first, and how to state and apply them, and then how to cite and apply authorities afterwards. And this remedy

## THE EVILS OF CASE-LAW—NOTES OF CANADIAN CASES.

should be applied vigorously in the office training of law students, law clerks, junior partners and associate counsel of small experience. To this extent the remedy is in our own hands.

As regards the unscrupulous and tricky practitioner, and he who works only for fees, the remedy is less easy of application; but it lies obviously in the direction of rooting out such characters, so far as it can be done, who are already members of the bar; cultivating a high standard of professional morals, such as may lead them to mend their ways, and still further to exercise the utmost care and diligence that none such, or as few as possible, be permitted or allowed to enter the profession. And this remedy, to be efficacious, requires the conjoint action or co-operation of the judges, the examining committees, and of every reputable member of the profession.

But the origin of the evil of case-law practice does not end here. Every practitioner demands—and the judges, for reasons which it is not now necessary to discuss, have yielded to the demand—that a written opinion shall, if possible, be prepared and filed in each and every case adjudicated. The consequence is that we are flooded with law reports, the mass of which is, or is likely soon to be, perfectly appalling. In this country alone, and saying nothing of foreign countries, which are continually contributing to the already overflowing stream, we have about two hundred and fifty courts and tribunals, the opinions of whose judges are regularly reported. The amount of legal literature thus thrown onto the market, and tumbled into our law libraries, is simply frightful, not only in its amount, and also in the quality of it, but for the reason that it fearfully aggravates and promotes the evil tendency to look to and rely on adjudicated cases rather than on sound principles.

(To be continued.)

## NOTES OF CANADIAN CASES.

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## CHANCERY DIVISION.

Ferguson, J.]

[August 31.

## BOULTON v. BLAKE.

*Lease—Covenant to pay rent and taxes—Conveyance away of part of the leased premises—Assignment by lessee—Action for a part of the rent and taxes—Apportionment—Eviction—Local improvement—Taxes—Additions to taxes in arrear.*

J. B. leased certain lots A, B, C, D, E and F, with *other* lands, to the defendant. E. R. C. also at the same time leased lot G and *other* lands to defendant. E. R. C. then conveyed his reversion in lot G to J. B., and J. B. conveyed away the *other* lands mentioned in his lease to S. A. H. Defendant assigned all his interest in both leases to J. S. McM., and J. S. McM. assigned all his interest in lots A, B, C, D, E, F and G to J. C. Both J. S. McM. and J. C. paid rent to J. B., and after his death to his executrix, the plaintiff. The rent of lots A, B, C, D, E, F and G fell in arrear, and the taxes also were left unpaid. Plaintiff then recovered judgment in an action of ejectment against J. C., and took possession of the lots.

In an action to recover the unpaid rent and taxes accrued on these lots before the recovery in ejectment, in which it was contended that as the action was brought against the original lessee, who had assigned the lease and was one on the covenant resting in privity of contract and not in privity of estate, there could not be an apportionment of the rent to these lots, it was

*Held*, following *The Mayor, etc., of Swansea v. Thomas*, L. R. 10 Q. B. D. 48, that the rent was apportionable, and the plaintiff was entitled to recover.

*Held*, also, that there was no eviction of the defendant by the lessor.

*Held*, also, on the evidence, that although defendant might be a surety for the assignee, there was no release of the assignee, and consequently no discharge of the surety.

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*Held*, also, following *Barnes v. Bellamy*, 44 U. C. R. 303, that the rent accrued from day to day, and was apportionable in respect of time accordingly.

*Held*, also, that under the wording of the covenant to pay "all taxes, rates, duties, and assessments whatsoever . . . now charged, or hereafter to be charged, upon the said demised premises," the defendant was liable for local improvement taxes and for the additions made under the Assessment Act, year by year, to the amount of the taxes in arrear or additions made by the municipality.

*Moss*, Q.C., for the plaintiff.

*Osler*, Q.C., and *Small*, for the defendant.

O'Connor, J.]

[September 2.

THOMPSON ET AL. V. GORE ET AL.

*Marriage settlement—Consideration for—Voluntary act—Fraud on creditors.*

In an action brought by T. K. & Co. on behalf of themselves and all the other creditors of J. G., against J. G., his wife, J. G., and J. K. B., the trustee, to set aside a marriage settlement, by which J. G., a day or two before his marriage, had settled the greater part of his property on his wife, in which it was shown that the relations between J. G. and his wife before the marriage were very little short of those of husband and wife, and that she would have accepted a proposal of marriage without hesitation, without any condition of a marriage settlement, and that J. G. was in insolvent circumstances, of which fact she must have been aware, and that the settlement was purely voluntary on the part of the husband, and that the wife knew nothing of it until she was asked to sign the deed,

*Held*, that the settlement was not the consideration or part of the consideration of the marriage, and that it could not stand.

*Commercial Bank v. Cook*, 9 Gr. 524, and *Columbine v. Penhall*, 1 Sm. & G. 228, referred to and followed.

*Fraser v. Thompson*, 1 Gif. 49, distinguished.

*G. T. Blackstock* and *T. P. Galt*, for plaintiffs.

*Lash*, Q.C., and *Falconbridge*, Q.C., for defendants.

Proudfoot, J.]

[Sept. 21.

[Sept. 29.

RE SIMMONS &amp; DALTON.

*Electoral Franchise Act—Revising Officer—Mandamus—Notice to voter—Notice to Revising Officer—Jurisdiction of Provincial Courts to issue mandamus.*

A Revising Officer, under the Electoral Franchise Act, 48 and 49 Vict. c. 40, having declined to entertain the application of S. to have the name of D. struck off the voters' list, on the ground that the notice to D. provided for by sec. 26 of the Act was not proved, and that the notice to the Revising Officer provided for by the same section was not duly served on or given to him in time.

On an application for a mandamus to the Revising Officer, although it appeared no copy of the notice to D. was kept, and no notice was served to produce the original, it was shown by two witnesses that a notice to D., filled up on a printed form with his name, address and the objection to his vote, had been mailed to him by a prepaid registered letter on June 26 for the sitting of the Revising Officer on July 12 following, and the certificate of registration was produced, although the witness had no distinct individual knowledge of the particular notice to D., and that such evidence had been given before the Revising Officer.

*Held*, that in the absence of evidence to the contrary, such proof was sufficient. The notice to the Revising Officer was left with his clerk at his office, during the absence from town of the Revising Officer, on Monday, June 28, and on his return on the afternoon of that day he was told what had been done, and that if he did not consider that sufficient the notice would be procured again and served on him personally; but he said that what was done was sufficient.

*Held*, that the last day for service for the sitting of the final revision to be held July 12 was Sunday, June 27, but that under sec. 2 sub-sec. 2 of the Act the time was extended and S. had all the next day, and that the notice was well given on Monday.

*Held*, also, that the service of the notice on the clerk of the Revising Officer was, under ss. 19 and 26, a sufficient "depositing with" the Revising Officer to satisfy the statute, and the conduct of the Revising Officer amounted to

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an adoption of the action of the clerk, and was equivalent to personal service, if such were required by the statute.

It was contended that the Revising Officer was an appointee of the Dominion Government, and that his sittings were sittings of a court of record, and that there was no jurisdiction in a Provincial Court to issue a mandamus to him.

*Held*, that the Dominion Parliament had by the Electoral Franchise Act interfered with civil rights in this Province, and made no provision for a court to superintend the conduct of the officials; and, following *Valin v. Langlois*, 3 S. C. R. 1, that until such a court is created, the Provincial courts, by virtue of their inherent jurisdiction, have a right to superintend the discharge of their duties by any inferior officer or tribunal.

*Held*, also, that the Revising Officer erred in point of law in assuming that the notice to him required personal service, and that it was too late, and in holding that notice to produce the notice to D. should have been given, which were not findings of fact, and such mistakes or errors are not such decisions to prevent the granting of the writ of mandamus. If he had found, as a matter of fact, that notice was not given to D., there might have been some difficulty in interfering with his conclusion.

The *Centre Wellington* case, 44 U. C. R. 132, referred to and distinguished.

*Aylesworth*, for the motion.

*Osler*, Q.C., and *O'Neill*, contra.

Divisional Court.]

[September 22.

MERCHANTS' BANK OF CANADA V.

MCKAY ET AL.

*Mortgage—Security for indebtedness—Sureties—Change of original securities—Release of sureties.*

K. & Co. were customers of the plaintiff's, and gradually accumulated a liability of about \$26,000, to secure which the defendants gave a mortgage containing a recital that the plaintiffs had agreed to make further advances to K. & Co. on receiving security for the then present indebtedness, and a redemption clause providing for the payment of all bills, notes and papers upon which K. & Co. were then

liable, together with all substitutions and alterations thereof, and all indebtedness in respect of the same, being a continuing security, notwithstanding any change in the membership of the firm. The bank did business with K. & Co. in two different ways—one by discounting K. & Co.'s customers' notes, in which case their rule was to notify the customers that they held their notes; and another by discounting K. & Co.'s own notes, and taking their customers' notes as collateral, in which case they always got the collateral notes to an amount exceeding the advance, but did not notify the customers.

At the time the mortgage was given, all the notes held by the bank were believed to be genuine, and the discount of the customers' paper very largely exceeded the discount of K. & Co.'s notes. K & Co. suspended two years later. At the time of the suspension it was discovered that by renewals and substitution nearly all the notes held at the date of the mortgage had been replaced by K. & Co. (in renewals and substitutions) by forgeries, and that the amount of the discounts of K. & Co.'s notes secured by the collaterals very largely exceeded the discounts of the customers' notes. In an action by the bank to foreclose the mortgage the mortgagors claimed they, as sureties, were discharged by the bank's action.

*Held*, that the bank parted with genuine and received fabricated securities, and through its laches or default necessarily worked prejudice upon the rights of the sureties; that of two innocent parties of whom one must suffer on account of the fraud or crime of a third, the one most to blame by enabling the wrong to be committed should bear the loss, and the defendants were exonerated from liability, so far as they were prejudiced by the conduct of the bank. *Prima facie*, the bank is liable to the extent of the face value of the securities surrendered, but they can reduce that by evidence as they may be advised.

*Rae*, for the plaintiffs.

*Moss*, Q.C., and *Stewart*, for the defendants.



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Divisional Court.]

[September 22.]

*Assignment for benefit of creditors—Chattel mortgage—Proof of consideration—Onus of proof—New trial.*

In an interpleader action where the plaintiffs were a chattel mortgagee and an assignee for the benefit of creditors of the judgment debtor to try the right to the proceeds of the goods sold by the sheriff, the assignee was examined and showed that he was a brother and an employee of the assignor, and that all the money he had collected under the assignment had been used by him in carrying on the assignor's business, and not in payment of creditors, and the mortgagee put in and proved the chattel mortgage, but gave no evidence of a debt due or of pressure used. On this the judge charged the jury that in his opinion there was no evidence of a debt or of pressure, and that if they believed the assignment was made for the purpose of defeating or delaying creditors it was bad, and he refused to allow the consideration to be proved after the plaintiffs closed their case, and the jury brought in a verdict for the defendant. On a motion to enter a verdict for plaintiffs, or for a new trial, it was

*Held, per BOYD, C.*—The plaintiffs proved enough to cast the burthen of attack on the defendant. Proof of the mortgage duly executed showed that the property and title to the goods passed from the judgment debtor to the mortgagee before the seizure. The execution creditor should displace this ownership by showing want of consideration or other reason. Suspicion would not justify the conclusion that the mortgage was a voluntary instrument contrary to its purport. There is no evidence that the wife knew of the husband's insolvency, and concurred with him in an attempt to gain a preference at the expense of the other creditors.

*Per PROUDFOOT, J.*—That the mortgage might be valid if given for a present advance of money for carrying on the business or other proper purpose, and that insolvency would not be a circumstance shifting the onus of proof, and that the production of the mortgage would be *prima facie* evidence, and that as the jury had found the evidence sufficient to justify their verdict that the assignment was not honestly made, the verdict should not be inter-

fered with on that point, but as the plaintiff, the trustee, appeared to have been misled, and was refused leave to supplement his evidence, a new trial should be granted to him.

*E. Furlong*, the trustee, plaintiff in person.

*F. Fitzgerald*, for the assignee plaintiff.

*I. Parks*, for the defendant.

Proudfoot, J.]

[September 29.]

POWELL V. PECK ET AL.

*Mortgage—Rate of interest—Payment into court—Court rate of interest—Rate of interest after maturity of mortgage—Contract or damages.*

A made a mortgage to B which matured June 1, 1880, and bore interest at 8 per cent. per annum. During certain legal proceedings in which A disputed his liability to pay the balance due on the mortgage, the money was paid into court, where it remained until April, 1886, when it was paid out to B, who had succeeded in establishing his right to it. The Master, in taking the accounts between the parties, allowed no interest on the money paid in, and B got it with the usual rate of interest allowed by the court, which was less than the rate provided for in the mortgage; but he allowed interest on the mortgage after its maturity at the rate therein provided up to December 22, 1886, the time appointed for payment, and certified that he allowed it as a matter of contract, and not as damages.

On an appeal and cross appeal from both of these findings, it was

*Held*, following *Sinclair v. The Great Eastern Ry. Co.*, L. R. 5 C. P. 391, that A should pay interest beyond the court interest, and, following *St. John v. Rykert*, 10 S. C. R. 278, that 8 per cent. was not payable after June 1, 1880, but only the legal rate. *McDonald v. Elliott*, 12 O. R. 98, referred to and distinguished.

*Delamere*, for plaintiff.

*Beck*, for defendants.

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

## PRACTICE.

Ferguson, J.]

[Nov. 1.]

## DEVEREUX v. KEARNS.

*Partition—Dowress as applicant—Allotting—Sale.*

A person entitled to dower, though not assigned, is entitled to maintain proceedings for partition.

*Rody v. Rody*, 17 C. L. J. 474, overruled. But, where one only of several is desirous of partition, the proper proceeding is to have part allotted to him, leaving the others to hold jointly or in common.

*Hobson v. Sherwood*, 4 Beav. 184, followed. In the present case, as the plaintiff, a dowress, had already taken proceedings under the Dower Act to have her dower assigned, and confessedly only applied for a partition with the object of having a sale of the land, which the other parties interested opposed, the application for partition was refused, with costs.

*W. Creelman*, for the plaintiff.

*J. Hoskin*, Q. C., for the infant defendant.

*Langlois*, for the adult defendants.

Ferguson, J.]

[Nov. 1.]

## RIDDELL v. MCKAY.

*Security for costs—Rules 429, 431, O. J. A.*

Where no reason was shown for reducing the amount of security required by a *præcipe* order for security for costs, issued under Rule 431 O. J. A., an order amending the *præcipe* order by reducing the amount to \$200, the security to be in the form of money paid into court, was reversed on appeal.

*Held*, that the provisions of Rule 429 O. J. A., do not so apply as to authorize the reduction of the security required by Rule 431 O. J. A.

*Aylesworth*, for the defendant.

*W. H. P. Clement*, for the plaintiff.

Wilson, C.J.]

[Nov. 2.]

## RE WALSH v. ELLIOTT.

*Prohibition—Division Court—Amount—Liquidation.*

The plaintiff sued in a Division Court for \$114, \$75 on a promissory note and \$39 on a bill of costs, of which the amount was not ascertained by any act of the defendant.

*Held*, that the claim was within the competence of a Division Court.

*Vogt v. Boyle*, 8 P. R. 249, applied and followed.

*J. B. Clarke*, for defendant.

*Shepley*, for plaintiff.

Wilson, C.J.]

[Nov. 5.]

## RE PAQUETTE.

*County judge, jurisdiction of—Prohibition—48 Vict. ch. 26 sec. 6 (O.)—Persona designata.*

A judge of a county court, acting under the authority of 48 Vict. ch. 26 sec. 6 (O.), removed an assignee for creditors and substituted another assignee. The first assignee, as alleged, refused to deliver over the keys of the place of business of the insolvent to the second assignee, and the judge made an order for the issue of a writ of attachment against the first assignee for contempt.

*Held*, that the judge, in acting under this statute, was not exercising the powers of the county court, but an independent statutory jurisdiction as *persona designata*, and had therefore no power to direct the issue of a writ of attachment; and prohibition was directed.

*Aylesworth*, for the first assignee.

*Shepley*, for the second assignee.

Wilson, C.J.]

[Nov. 5.]

## MEWCOMBE v. McLUBAN.

*Order after action dismissed—Statement of claim—Extending time—Master in Chambers, jurisdiction of—Rule 462, O. J. A.*

An order of the 4th October, 1886, extended the time for delivery of statement of claim till the 12th October, but provided if it was not so delivered, the action should stand dismissed, with costs. Upon failure to deliver in time, the defendant signed judgment dismissing the action.

*Held*, that notwithstanding the dismissal of the action, an order could properly be made under Rule 462 vacating the judgment and further extending the time for delivering the statement, and the Master in Chambers had jurisdiction to make such an order.

*H. Symons*, for defendant.

*J. B. Clarke*, for plaintiff.

## CORRESPONDENCE.

Mr. Dalton, Q.C.]

[Nov. 10.]

SEYMOUR V. DEMARSH.

*Local venue—Foreclosure—Possession—Ejectment*  
—Rule 254 O. J. A.

An action by a mortgagee for foreclosure, payment and possession of the mortgaged premises is not an action of ejectment within the meaning of the exception in Rule 254 O. J. A., and the venue need not therefore in such an action be laid in the county where the lands lie.

*Hoyles*, for defendant.

*H. J. Scott*, Q.C., for plaintiff.

## CORRESPONDENCE.

THE REGISTRY ACT—WEIR v. NIAGARA  
GRAPE CO.

To the Editor of the Law Journal :

SIR,—I have perused an article in the last number of the LAW JOURNAL, in reference to *Weir v. Niagara Grape Company*, 11 O. R. 700. I do not altogether agree with the views expressed there; and as I think it not undesirable that a temperate criticism of the judgments of our courts should be given to the profession in your periodical, I will take the liberty of expressing my views in reference to this particular action.

Section 74 of the Registry Act in effect postpones, as fraudulent and void, any instrument prior in date to any other subsequent instrument which is first recorded, and which is held in good faith and for value and without actual notice of the prior instrument. There is nothing in that section making it incumbent upon a court to direct that such an instrument shall be cancelled and the registration thereof vacated.

In reference to the powers of the court to deal with instruments which have been executed and delivered between parties, I conceive the doctrine to be this, that any instrument that has been delivered for a fraudulent or improper purpose—quite aside from the Registry Act—may by the court be declared to be void, and the registration, if necessary, to be vacated. This doctrine is equally applicable whether titles are recorded or not; but there are perhaps occasions, where the title is a recorded one, in which the court would

interfere, and yet would not interfere where the title is not a recorded one. It is also equally clear that the court will not remove as a cloud upon the title—even where titles are recorded—if the conveyance be void upon its face. No danger can result from its existence even if removed. His Lordship, Mr. Justice Armour, refers to the case of *Buchanan v. Campbell*, 14 Gr. 163, where the court refused to set aside such conveyance, from the simple fact that, upon a perusal of the deed (as the law then was), no interest passed by it as against the plaintiff; and the same general principle is well exemplified in the case of *Hurd v. Billington*, 6 Gr. 145, where it was quite obvious in looking at the power of attorney that the party who executed the deed on behalf of the grantor under the power of attorney had not the requisite authority. In these cases apparently neither the execution nor the registration of the instruments was otherwise than in good faith, and the court did not simply see fit to interfere.

But as to instruments recorded after the instrument held by the person seeking the aid of the court, which may or may not have been executed before the plaintiff's instrument; in my humble opinion it would not be proper in all cases that the court should direct the registration of such instruments to be vacated. The judgment of the court as to this point in *Truesdall v. Cook* is an *obiter dictum*, and may have been stated somewhat too broadly. In the case of *Dynes v. Bales*, alluded to by Mr. Justice Armour, the instrument was, I think, dated, delivered and recorded after the instrument held by the plaintiff, who prayed for the vacation of the registration of such instrument. I should submit, in my humble judgment, considering the importance that is attached to recorded instruments in this country, that when the instrument has been executed and recorded from idle or improper motives, or where no possible injury could possibly occur from such cancellation, and vacation of registration of such instrument as a matter of record—in all such instances—I should conceive, it would be proper for the court to direct such instruments to be cancelled, and such registration to be vacated. Mr. Justice Armour cites a case—apparently within the scope of section 74, where certainly it would be a grievous wrong for the court so to act—that is the instance of A making a mortgage to B, and subsequently another to C, who takes his mortgage without notice of the prior mortgage, records it before B records his prior mortgage, and advances the full consideration, when the property might be well worth both mortgages; and I do think that the judgment of the court in the action

## CORRESPONDENCE—FLOTSAM AND JETSAM.

I am discussing hits the nail upon the head when it decreed that the instrument second in point of time had priority over the instrument first in point of date, though subsequently recorded.

There seems in this action to be some obscurity about the facts which, I think, indicate that when the plaintiff purchased the property he was not aware of the existence of the vines in question. Undoubtedly Kievell must have been aware of the agreement at the time he conveyed the property, and either acted fraudulently or, at all events, carelessly in not disclosing its existence. If the plaintiff had been aware of the existence of the vines in question, and not aware of the existence of the agreement, and was thereby induced to pay a larger consideration for the property than he otherwise would have paid, I cannot see why he should not retain the vines without accounting in any way to the defendants. His position appears to be precisely as if a building had been erected upon the property in question for the consideration of the construction of which the builder held an unrecorded mortgage. I cannot think, in the latter case, that the holder of the unrecorded mortgage would have any claim whatever against the vendee, and I should think that the same result would follow here, but as apparently the plaintiff here has alleged nothing of the kind, I think it must be assumed that the real facts would show that he purchased the property in question, unaware of the existence of the vines in question. Now, if that be the case, why should the defendants not receive compensation for their vines? The plaintiff has received something of considerable value for which he has paid in reality nothing, and it is not entirely unlikely that he, with that disregard of the law of *meum* and *tuum*, which characterizes many of our race, thought the opportunity not an unfit one for retaining the vines, and getting rid of the lien, and especially so as the relief that the defendants mainly relied on was the right to remove the vines. I cannot see, however, why the plaintiff should be called upon to perform the agreement which he never entered into, and which might operate as an injustice to him unless he were offered by the court (of which there is no evidence) the option of allowing the defendants to remove the vines, or be subjected (if the court might think proper under the circumstances to award against him) to the terms of the agreement.

If that were the case, and he had the option of giving up the vines, or of accepting the agreement, if the court had power so to direct that relief to the plaintiffs, he could not complain.

In the absence of any such offer to him, I should

think the proper remedy would have been to refer to some officer of the court, to ascertain, without costs to either party, how much the property had been enhanced in value by the existence of the vines in question; in other words, what the plaintiff would have realized from the vines in question after making all just allowances.

SEARCHER AFTER TRUTH.

## FLOTSAM AND JETSAM.

A STRANGE STORY.—Here is another Russian legacy case. A rich Russian lady bequeathed 400 roubles for the support and comfort of the dearest favourite of all her dogs. One of the servants was appointed the dog's guardian so long as it should live, but if the dog should survive its guardian then the care and charge should pass to another servant. The dog is now dead, and, according to the provisions of the will, the servant who had conscientiously fulfilled her duty to the dog for several years comes in for the 400 roubles, the interest of which, it appears, had been sufficient to keep the dog in ease and comfort. The residuary legatee, however, has not been permitted to settle down to the enjoyment of the 400 roubles without a challenge. The other servant mentioned, in view of probabilities or possibilities, demanded half the money on the pretence that the will declared that "descendants" of the dog were to share in the benefit of the legacy, and she was in possession of a "child" of the dead dog. But the guardian of the bequeathed dog avers that her charge died "childless." So the Russian lawyers and law courts have set to work, and are doing their best not only to swallow up the 400 roubles, but also to appropriate to themselves many more roubles from each of the litigants.—*Ex.*

## LAW SOCIETY OF UPPER CANADA.

## Law Society of Upper Canada.



## OSGOODE HALL.

## TRINITY TERM, 1886.

During this Term the following gentlemen were called to the Bar, namely:—*Sept. 6th*—John Murray Clarke (Honours and Gold Medal); William Smith Ormiston, Edward Cornelius Stanbury Huycke, William Murray Douglas, William Chambers, William Nassau Irwin, George Henry Kilmer, Francis Cockburn Powell, Lawrence Heyden Baldwin, Lyman Lee, Robert Charles Donald, George Hutchison Esten, Thomas Urquhart, Joseph Coulson Judd, Walter Samuel Morphy, John Wesley White, Thomas Johnson, William H. Wardrope, Francis Edmund O'Flynn. *Sept. 7th*.—Thomas Joseph Blain (who passed his examination in Trinity Term, 1885), William Lees, Charles True Glass, Alexander David Hardy, John Campbell, Richard John Dowdall, John Carson, Richard Vanstone, George Edward Evans, Charles Bagot Jackes. William Hope Dean; and *Sept. 17th*, William Robert Smythe (who passed his examination in Hilary Term, 1886). The following gentlemen received Certificates of Fitness to practise as Solicitors, namely:—John Murray Clarke, George Hutchison Esten, Wm. Smith Ormiston, Wm. Chambers, Alex. McLean, Robt. George Code, Henry Smith Osler, Edward C. S. Huycke, Wm. John McWhinney, Wm. Murray Douglas, Chas. True Glass, Robt. Charles Donald, Herbert McDonald Mowat, Francis Edmund O'Flynn, Lawrence Heyden Baldwin, John Bell Dalzell, Lyman Lee, Angus McCrimmon, Ranald D. Gunn, Joseph Coulson Judd, Heber Hartley Dewart, John Wesley White, Alex. David Hardy, Wm. Mansfield Sinclair, Hubert Hamilton Macrae, John Geale (who passed his examination in Hilary Term, 1886, also received his Certificate of Fitness). The following were admitted into the Society as Students and Articled Clerks, namely:—

*Graduates*.—George Ross, John Simpson, George Wm. Bruce, John Almon Ritchie, James Armour, John Miller, Frederick McBain Young, Malcolm Roblin Allison, Robert Baldwin, Charles Eddington Burkholder, Alexander David Crooks, Andrew Elliott, Robert Griffin Macdonald, Thomas Joseph Mulvey, James Milton Palmer, James Ross, John Wesley Roswell, Richard Shiell, Alfred Edmund Lussier, Charles Murphy, George Newton Beaumont, Charles Elliott.

*Matriculants of Universities*.—William Johnston, Samuel Edmund Lindsay, Nelson D. Mills.

*Junior Class*.—Richard Clay Gillett, Alexander James Anderson, George Prior Deacon, Louis A. Smith, Andrew Robert Tufts, William Wright, Kenneth Hillyard Cameron, Harry Bivar Travers, John Alfred Webster, Thomas James McFarlen, William Elijah Coryell, John Henry Glass, Albert Henry Northey, Archibald Alexander Roberts, Charles B. Rae, George S. Kerr, William Egerton Lincoln Hunter, Francis Augustus Buttrey, Frederick Thomas Dixon, Hector Robert Argue Hunt, Daniel O'Brien, Franklin Crawford Cousins, Thomas Alexander Duff, William G. Bee, Stephen Thomas Evans, William Mott, Thomas Arthur Beament, and John Alexander Mather was allowed his examination as an Articled Clerk.

## SUBJECTS FOR EXAMINATIONS.

## • Articled Clerks.

- Arithmetic.  
Euclid, Bb. I., II., and III.  
1884 English Grammar and Composition.  
and English History—Queen Anne to George  
1885 III.  
Modern Geography—North America and Europe.  
Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

## Students-at-Law.

- Cicero, Cato Major.  
Virgil, Æneid, B. V., vv. 1-361.  
1884 Ovid, Fasti, B. I., vv. 1-300.  
Xenophon, Anabasis, B. II.  
Homer, Iliad, B. IV.  
Xenophon, Anabasis, B. V.  
Homer, Iliad, B. IV.  
1885 Cicero, Cato Major.  
Virgil, Æneid, B. I., vv. 1-304.  
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

## MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

## ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

## HISTORY AND GEOGRAPHY

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography North America and Europe.

Optional subjects instead of Greek:

## LAW SOCIETY OF UPPER CANADA.

## FRENCH.

A paper on Grammar,  
Translation from English into French prose.  
1884—Souvestre, Un Philosophe sous le toits.  
1885—Emile de Bonnechose, Lazare Hoche.

## OR NATURAL PHILOSOPHY.

Books—Arnett's elements of Physics, and Somerville's Physical Geography.

*First Intermediate.*

Williams on Real Property, Leith's Edition;  
Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

*Second Intermediate.*

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

*For Certificate of Fitness.*

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

*For Call.*

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchor, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:  
Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year and his Second in the first six

## LAW SOCIETY OF UPPER CANADA.

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchler, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

## F E E S .

Notice Fees .....	\$1 00
Students' Admission Fee .....	50 00
Articled Clerk's Fees .....	40 00
Solicitor's Examination Fee .....	60 00
Barrister's " " .....	100 00
Intermediate Fee .....	1 00
Fee in special cases additional to the above. ....	200 00
Fee for Petitions .....	2 00
Fee for Diplomas .....	2 00
Fee for Certificate of Admission .....	1 00
Fee for other Certificates .....	1 00

## PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890.

*Students-at-law.*

## CLASSICS.

1886.	Cicero, Cato Major.
	Virgil, <i>Æneid</i> , B. I., vv. 1-304.
	Cæsar, <i>Bellum Britannicum</i> .
	Xenophon, <i>Anabasis</i> , B. V.
	Homer, <i>Iliad</i> , B. VI.
1887.	Xenophon, <i>Anabasis</i> , B. I.
	Homer, <i>Iliad</i> , B. VI.
	Cicero, <i>In Catilinam</i> , I.
	Virgil, <i>Æneid</i> , B. I.
1888.	Cæsar, <i>Bellum Britannicum</i> .
	Xenophon, <i>Anabasis</i> , B. I.
	Homer, <i>Iliad</i> , B. IV.
	Cæsar, B. G. I. (vv. 1-33.)
	Cicero, <i>In Catilinam</i> , I.
1889.	Virgil, <i>Æneid</i> , B. I.
	Xenophon, <i>Anabasis</i> , B. II.
	Homer, <i>Iliad</i> , B. IV.
	Cicero, <i>In Catilinam</i> , I.
	Virgil, <i>Æneid</i> , B. V.
1890.	Cæsar, B. G. I. (vv. 1-33)
	Xenophon, <i>Anabasis</i> , B. II.
	Homer, <i>Iliad</i> , B. VI.
	Cicero, <i>In Catilinam</i> , II.
	Virgil, <i>Æneid</i> , B. V.
	Cæsar, <i>Bellum Britannicum</i> .

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's *Arnold's Composition*, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

## MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

## ENGLISH.

A Paper on English Grammar. Composition.

Critical reading of a Selected Poem:—

1886—Coleridge, *Ancient Mariner* and *Christabel*.

1887—Thomson, *The Seasons*, Autumn and Winter.

1888—Cowper, *the Task*, Bb. III. and IV.

1889—Scott, *Lay of the Last Minstrel*.

1890—Byron, *the Prisoner of Chillon*; *Childe Harold's Pilgrimage*, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

## HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe. Optional Subjects instead of Greek:—

## FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886

1888 } Souvestre, *Un Philosophe sous le toits*.

1890

1887 } Lamartine, *Christophe Colomb*.

1889

## OR, NATURAL PHILOSOPHY.

*Books*—Arnett's *Elements of Physics*; or Peck's *Ganot's Popular Physics*, and *Somerville's Physical Geography*.

## ARTICLED CLERKS.

Cicero, *Cato Major*; or, Virgil, *Æneid*, B. I., vv. 1-304, in the year 1886: and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, or Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe. Elements of Book-Keeping.

*Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.*

# Canada Law Journal.

VOL. XXII.

DECEMBER 1, 1886.

No. 21.

## DIARY FOR DECEMBER.

1. Wed..Lord Chr. Hardwicke born 1690.
2. Thur.Sittings of Div. Ct. Chy. Div. H. C. J. begin.
5. Sun...and Sunday in Advent.
7. Tues..C. C. York sittings for trials begin.
8. Wed..Sir Wm. Campbell, 6th C. J. of Q. B., 1825.
12. Sun...3rd Sunday in Advent.
14. Tues..C. C. sittings for trials commence, except in York.

TORONTO, DECEMBER 1, 1886.

OUR American cousins of the legal persuasion often poke fun, with or without cause, at some of what might be termed the aristocratic peculiarities of the Old Country. It is on the other hand, in our opinion, not only a democratic peculiarity, but in a legal writer ridiculous affectation, to use such a clumsy title as the following in an article which we see in a contemporary: "Liability of an employer to an employé injured by the negligence of a fellow employé." The use of the old-fashioned words, "master and servant," would be more intelligible, technical and "handy," and hurt no one's feelings. We do not believe that those who, by ennobling service, learn to rule, could possibly be offended by the old fashioned *terme de la ley* which all lawyers understand.

ON the 10th November last Sir James Bacon, at the advanced age of eighty-six, retired from the Bench and bade adieu to the Bar. The occasion was marked by the unusual compliment of all the other judges attending in court to take part in the valedictory proceedings. The Attorney-General, on behalf of the Bar, which was represented by numerous and influential barristers of high standing in the

profession, tendered the aged judge an affecting farewell which was replied to in fitting terms. The career of the ex-Vice-Chancellor (who is the last judge to bear that title, which is now extinct so far as the English judges are concerned), is in some respects remarkable, and illustrates in a striking manner the extraordinary energy and vitality which characterizes so many men who attain high judicial positions in England. Appointed a judge at the age of seventy, when most men are thinking that their life work is at an end, he has for sixteen years discharged the duties of his office with satisfaction to the profession. His reputation as a lawyer was made in Bankruptcy, in which department of jurisprudence he was *facile princeps*. As an equity judge he also distinguished himself. His judgments, however, were not unfrequently reversed on appeal, a fact due, perhaps, to a disposition to strive after what appeared to him the justice of the case, with too little regard at times to the case law on the subject. In one instance which might be mentioned he was curiously led away by the opposite tendency, and gave judgment against what he admitted to be his inclination, by a too rigid adherence to the letter of a statute which he conceived precluded him from doing what he would like to have done, and what the evident merits of the case demanded. We refer to his decision in *Hall-Dare v. Hall-Dare*, 29 Chy. D. 133, which was subsequently reversed in the Court of Appeal.

Since his retirement it has come out that he was accustomed to relieve the monotony of judicial business by drawing likenesses in his note book of counsel, suitors and witnesses as the fancy struck him, and, no



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## TRIAL AT BAR—ACTIONS IN WHICH THE CROWN IS INTERESTED.

*Dixon v. Farrer*, 17 Q. B. D. 658, is deserving of a passing notice for the somewhat interesting discussion by Wills, J., as to the right of the Attorney General to demand a trial at bar in any action in which the Crown is interested. He arrives at the conclusion that the right of the Crown to a trial at bar, when the Crown is the complaining party, is not a branch of the prerogative, but merely the survival in favour of the Crown of a right which was formerly common, alike both to sovereign and the subject, but which has been taken away from the latter by the Stat. Westminster 2. c. 30, which gives the writ of *nisi prius*, which does not apply to the Crown. But he also concludes that the Crown has the prerogative right to intervene in any cause, and on the statement of the Attorney General on his own authority that the Crown is interested in the subject matter of the suit, may claim a trial at bar.

## SHIP—BILL OF LADING—DAMAGE CAUSED BY RATS.

The short question decided in *Pandorf v. Hamilton*, 17 Q. B. D. 670, was that, where rats by gnawing a hole in a pipe on board a ship, had caused sea water to escape from the pipe so as to damage the cargo; that this was not a damage occasioned by a "danger and accident of the sea," for which, by the terms of a charter party, the ship-owner was exempted from liability, the Court of Appeal (Lord Esher, M.R., Fry and Bowen, LL.J.) overruling Lopes, L.J., who held that it was.

PRACTICE—MORTGAGE ACTION—COSTS—APPEAL RULES  
1883 ORD. 65 R. 1 (ONT. RULE 426.)

Turning now to the cases in the Chancery Division, the first to be noted is *Charles v. Jones*, 33 Chy. D. 80, which was an action for redemption, in which charges of misconduct were alleged against the mortgagee. Bacon, V.C., had, notwithstanding, allowed him his costs, and it was on the propriety of his so doing that the plaintiff appealed. The defendant contended that the appeal, being in respect of costs, would not lie. And to this contention the Court of Appeal acceded. The result of their Lordships' decision may be gathered by the following passage in the judgment of Lopes, L.J.

A mortgagee has an absolute right to costs, unless they are forfeited by misconduct; if they are forfeited by misconduct, then they are within the discretion of the Judge. In the present case, assuming that there has been misconduct, the costs are within the discretion of the Judge. Then the Act says that where the costs are within the discretion of the Judge there shall be no appeal unless leave be given by the Judge.

The effect of the decision is that though a mortgagee deprived of costs on the ground of misconduct may appeal on the ground that he has not been guilty of misconduct, yet it notwithstanding his misconduct, the court allows him his costs, that order is not appealable.

PROMOTER OF COMPANY—SECRET PROFIT MADE BY  
PROMOTER—LIABILITY TO ACCOUNT—SOLICITOR.

*Lydney & Wigpool Iron Ore Co., v. Bird*, 33 Chy. D. 85, was noted by us, *ante* p. 139, when the case was before Mr. Justice Pearson. The action was brought to compel the defendant to account to the plaintiffs for a secret profit made by him as promoter of the company. That learned Judge, on the facts, was of opinion that the defendants were not in the position of promoters, and had dismissed the action; but this decision the Court of Appeal, taking a different view of the facts, have now reversed.

The Court of Appeal was of opinion that, on the facts, it was clear that the price of the property sold to the company had been increased at the instance of one of the defendants who took the principal part in getting up the company for the purpose of enabling the vendors to pay him the sum of £10,800, which the plaintiffs claimed to recover in this action, and that therefore this defendant was bound to account to the company for the profit so made; but in estimating the amount of the secret profit, for which he was accountable, it was held that he was entitled to be allowed legitimate expenses incurred by him in forming and bringing out the company, such as the reports of surveyors, the charges of solicitors and brokers and the costs of advertisements, but not a sum of money which he had paid to his co-defendant for guaranteeing the vendors to take up shares in order to float the company.

Pearson, J., in dismissing the action, had ordered a sum of money, which had been paid into court as security for costs, to be paid out

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to the defendant's solicitors on account of the defendant's costs, and on the reversal of his judgment it was asked that the solicitors might be ordered to refund; but the court refused to make any such order in the absence of notice to the solicitors, and intimated that even if notice had been given no order could be made against the solicitors personally, and that although the money had been paid to them, yet their client alone, and not the solicitors, was responsible for the money.

## WILL—CONSTRUCTION—GIFT PER STIRPES OR PER CAPITAL.

In *Re Campbell's Trusts*, 33 Chy. D. 98, the Court of Appeal sustained the judgment of Pearson, J., noted *ante* p. 203. By the will in question the testator gave some houses to trustees in trust, to receive the rents and pay the same in equal moieties to his son and daughter during their lives, and after the death of either of them without issue living, upon trust to pay the whole thereof to the survivor during the life of such survivor; but in case there should be issue living of the first of them so dying, then upon trust to pay one moiety to the survivor and divide the remaining moiety between the children of the one so first dying; and after the decease of the survivor of the testator's children, on trust to sell the property and divide the proceeds equally amongst all and every of the child or children of each of them, the testator's son and daughter, who should attain twenty-one, in equal proportions. The son died, leaving eight children; the daughter had only one child, who attained twenty-one and died. The question was whether these grandchildren of the testator were entitled *per stirpes* or *per capita*, and the Court of Appeal and Pearson, J., held that they took *per stirpes*.

## TRUSTEE ACT, 1850—RE-APPOINTMENT OF, EXISTING TRUSTEES—VESTING ORDER.

In *Re Vicat*, 33 Chy. D. 103, an application was made under the Trustee Act of 1850 to appoint trustees and for a vesting order under the following circumstances: A, B and C were named as trustees in a will; A died, B became lunatic, and C appointed E and F trustees in the place of A and B. Part of the trust estate consisted of a mortgage of freeholds. The appointment of E and F was un-

questionably valid; but the court was asked, on the authority of *Re Pearson*, 5 Chy. D. 982, to re-appoint them and make an order vesting the mortgage property in C, E and F. This the Court of Appeal declined to do, holding that the re-appointment by the court of trustees already validly appointed is a nullity. The court, however, gave leave to amend the petition by asking for the appointment of some person to convey in the place of the lunatic jointly with C to himself and E and F, and on the petition being so amended made an order accordingly.

## TITLE DEEDS—CUSTODY OF DEEDS—SEVERAL PERSONS INTERESTED IN DEEDS.

*Wright v. Robotham*, 33 Chy. D. 106, was an action brought to compel the delivery up of certain deeds which had come into the possession of the defendants under the following circumstances:—

The defendants were the successors in business of certain solicitors to whom the owner of an estate had given the title deeds for safe keeping. Subsequently the owner settled the estate to which the deeds related, and under this settlement the plaintiff became entitled to part of the land, and the heir-at-law of the settlor to the residue. The heir-at-law could not be found and was not a party to the action. The Court of Appeal, affirming Kay, J., held that the defendants under these circumstances should not be ordered to deliver up the deeds to the plaintiffs, but that they should be directed to deposit them in court, with liberty to the plaintiffs to inspect them and take copies. Kay, J., directed an inquiry as to the heir-at-law; but, on appeal, this direction was struck out. The principal point was succinctly put by Lindley, L.J. "The question is reduced to this, where two persons are entitled to title deeds can one recover without the other? I am of opinion that Mr. Justice Kay was right in holding that he cannot."

## SOLICITOR AND CLIENT—MORTGAGE BY CLIENT TO SOLICITOR TO SECURE DEBT PRESENTLY PAYABLE—UNIVERSAL PROVISIONS.

In *Pooley's Trustee v. Whetham*, 33 Chy. D. 111, an attempt was made to set aside a sale made under a power of sale in a mortgage upon an interest in a railway, executed by a client in favour of his solicitor, on the ground

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that the solicitor had neglected to explain to the client that the power of sale was not in the usual form, and authorized a sale without notice. It appeared that the debt for which the mortgage was given was overdue and presently payable when the mortgage was given, and that the mortgage was in effect an arrangement for giving the client time for payment; and on this ground, therefore, it was held by Pearson, J., and also by the Court of Appeal that the doctrine of *Cockburn v. Edwards*, 18 Chy. D. 449, did not apply.

## SELECTIONS.

## EFFECT OF BANK MARKING A CHEQUE.

The case of *The Drovers' Bank v. The Anglo-American Co.* is of interest on this point. We find it reported in *Central Law Journal*, p. 182.

HEAD NOTE.—In the case of a certified cheque, the bank certifying the cheque is primarily liable for its payment, and it is negligent in a bank or agent for collection of such cheque to send it to the certifying bank itself for payment.

STATEMENT OF THE CASE.—The Anglo-American, etc. Co., placed in the hands of the Drovers', etc. Bank, a cheque drawn and certified by Rice & Messmore, bankers, of Cadillac, Michigan. The Drovers' Bank forwarded the cheque for collection to Rice & Messmore themselves. The cheque was not paid, and the Anglo-American Company brought suit for its amount against the Drovers' Bank and recovered judgment. The bank appealed.

SCHOFIELD, J., delivered the opinion of the court.

Assuming, first, that appellant is not chargeable with knowledge of the existence of any other bank than that of Wright & Messmore, at Cadillac, Michigan; and second, that all the information it had, or could reasonably obtain at the time in respect to the financial standing of Rice & Messmore was that they were solvent—were Rice & Messmore suitable agents to whom to transmit the certified cheque for

collection after it was placed by appellee in appellants' possession? We do not think it is of much consequence whether appellant took the cheque as payment on account, or for the purpose merely of collection; for in either view it is entitled to show that the cheque, if it has discharged its duty by an effort to collect it, has availed nothing. Nor do we regard the evidence that certain banks in Chicago were in the habit of transmitting cheques drawn on other banks, to those banks for collection, as affecting the present question. That evidence hardly comes up to the requirement of this court in regard to proof of a common-law custom, as laid down in *Turner v. Dawson*, 50 Ill. 85, and subsequent decisions of like import; but if it did, that custom does not include cases in which certified cheques are sent for collection to the banks by which they are certified. In the case to which the evidence relates there is no primary liability on the part of the bank to which the cheque is sent; but in the case of a certified cheque the bank is primarily liable for its payment. So far as affects the present question, its position is precisely what it is where it makes its promissory note, bond, or other evidence of original indebtedness. *Bickford v. First Nat. Bank*, 42 Ill. 242, et seq.

The same person cannot be both debtor and creditor at the same time, and in respect of the same debt. How then can he who is debtor, be at the same time, and in respect of the same debt, the disinterested agent of the creditor? Can it be said to be reasonable care, in selecting an agent, to select one known to be interested against the principal—to place the principal entirely in the hands of his adversary? The interest of the creditor, when his debtor is failing, is that steps be taken promptly, and prosecuted with vigour, to collect his debt. But at such a time the inclination of the creditor quite often, and it may be, sometimes his interest too, is to procrastinate. The debtor may often be interested in bringing about a compromise with his creditors whereby his debts may be discharged for less than their face. But the creditor, whose debt can all be collected by legal proceedings can never be interested in producing that result. Surely it could not be held reasonable care and diligence in an agent holding for collection the promissory note given by

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one individual to another individual, to send the promissory note to the maker, trusting to him to make payment, delay it, or destroy the evidences of indebtedness, and repudiate the transaction, as his conscience might permit. If this would not be held to be reasonable care and diligence, why should the same conduct be held to be reasonable care and diligence when applied to a bank?

It is to be borne in mind appellant was not compelled to accept this cheque for collection. It assumed the burden voluntarily, and it ought to have known that the certified cheque was not delivered to it merely to have it exchanged for the draft of Rice & Messmore on some other bank; for if this had been desired, it ought to have known that appellee would have obtained such a draft instead of a certified cheque. If appellant had no correspondent or agent at Cadillac, through whom to make collection, it should so have informed appellee, and then acted on the directions of appellee. This would have imposed no hardship, and would have protected all. It is true that when appellee placed the cheque in the hands of appellant, it was to be presumed that it was intended that appellant should collect by the ordinary and usual mode of collecting in such cases; but neither from facts proved, nor as a matter of law, was it to be inferred that the cheque was to be surrendered to Rice & Messmore to use their pleasure as to the time and manner of payment and the disposition of the cheque. If appellant was willing to take the step without special stipulations, appellee was authorized to assume therefrom that it was able to collect, and that it had a proper agent through whom to do it promptly.

*Indig v. City Bank*, 80 N. Y. 106, cited by counsel for appellant, is entirely different in its material facts from that in the present case, as we conceive. There the bank owed no primary duty to pay. The note was sent to it for collection, not from itself, but from the maker of the note. Its liability was solely that of an agent for collection.

In the recent case of *Merchant's Nat. Bank v. Goodman*, 2 Atl. Rep. 687, the Supreme Court of Pennsylvania however lay down the rule directly the opposite of that laid down by the New York Court of Appeals in *Indig v. City Bank*. The suit

there involved the question whether the bank on which the cheque was drawn was a suitable agent to which to transmit the cheque for collection. And the court held that it was not. The court among other things said: "We think the principle may be stated as a true one, as the plaintiffs' counsel have presented it, that no firm, bank, corporation or individual can be deemed a suitable agent, in contemplation of law, to enforce in behalf of another a claim against itself. The only safe rule is to hold that an agent with whom a cheque or bill is deposited for collection must transmit it to a suitable agent, to demand payment in such manner that no loss can happen to any party, whether he is depositor and indorser, or the indorsee and holder. . . . We interpret the cases to which we have referred as establishing the rule of transmission to a suitable correspondent or agent, to mean that such suitable agent must, from the nature of the case, be some one other than the party who is to make the payment. By no other rule can the rights of indorsers be protected, if it is the interest of the party who is to make payment to hinder, postpone or defeat payment. This imposes no hardship on the institution undertaking to transmit for collection, which can always protect itself by stipulating that special instructions by the depositor shall be given, which will save the collecting bank from all risk or peril."

It is unnecessary to say that we concur in these views any further than they are applicable to the facts before us.

We find no cause to disturb the judgment below and it is therefore affirmed.

## NOTE BY EDITOR OF "CENTRAL LAW JOURNAL."

To confide the collection of a money obligation to its payer would seem to be *quasi agnum committere lupo*, but it seems that an Illinois bank has come to grief by this precise form of misplaced confidence.

A certified cheque is an accepted bill of exchange, and all the legal attributes of the latter attach equally to the former.\* The liability of the drawer of the cheque is precisely that of the drawer of a bill of exchange accruing only upon the protest for non-payment.† Certifying a cheque to be "good," is

\* *Harker v. Anderson*, 21 Wend. 372; *Conger v. Armstrong*, 3 Johns. Cas. 5.

† *Smith v. Jones*, 20 Wend. 102; *Merchants' Bank v. Spicer*, 6 Wend. 445; *Murray v. Judah*, 6 Cow. 484; *Conroy v. Warren*, 3 Johns. Cas. 259; *Glenn v. Noble*, 1 Blackf. 104.

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nothing more nor less than a promise by the bank to pay it when presented.† It follows of course that by certifying a cheque, the bank becomes the principal debtor, its obligation to pay being absolute, while that of the drawer is subsidiary and contingent.

All this is familiar law; the only questions raised by the principal case are whether it is negligence in the collecting bank to entrust the collection of the cheque to the bank by which it has been certified and is to be paid, and whether there is such a custom established as would defeat the charge of negligence.

It is the duty of the bank receiving for collection commercial paper payable at a distant point to transmit it speedily to a suitable agent at that place for collection, and when that is done, its liability is at an end.§ The question is, Who in case of the collection of a cheque is a suitable sub-agent. The Supreme Court of Pennsylvania says|| that the bank upon which the cheque is drawn is not, because its interest is plainly to "delay instead of speeding payment." *A fortiori* is that the case, when by certifying a cheque it had become the principal debtor.

As to custom, the well established rule on that subject is that a custom to be binding must be uniform, long established, and generally acquiesced in, and so well known that parties contracted with reference to it, when nothing is said to the contrary,¶

It is often said that extremes meet, and it is a little curious to find that the managers of the defendant bank in this case, acute, wide awake men of business, *au fait* in all financial matters, as they no doubt are, have committed the precise blunder, for which, in a well-worn joke, the newspapers have laughed at two unsophisticated Dutch farmers. They were neighbours, friends, both ready money men who had never in their lives given or received a promissory note, but it so happened that one had occasion to borrow a small sum of money from the other. He suggested that "in case of death," he should give his note for the amount, and the note was drawn, inartistically perhaps, but probably it had the root of the matter in it. The question then arose: who was to keep the note? There was no precedent in the experience of either. The lender, however, solved the problem, shrewdly saying: "You keeps it Hans, for then you will know when the time comes for you to pay it."

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(Continued from page 383.)

I have not time to go over the inherent badness of many lines of decisions; the confusion and uncertainty which arises from the conflicting decisions of different courts, and still worse, from conflicting decisions of the same court; the gross errors which have crept into the law in consequence of carrying precedents too far, or from applying the precedent of one case to another where it is inapplicable; and still further, from applying obsolete maxims and legal fictions to the obstruction of justice, when they were never devised or intended to be used except to promote justice. All these matters are familiar to every practitioner, and only need now to be alluded to. But what I wish to suggest is this: That where the result of a hearing or argument in the higher court is simply an affirmance of the judgment or decree of the court below, there is not, in a large majority of cases, any adequate or sufficient reason for the preparation of any written opinion at all, and still less for its publication. If the case is properly tried below, without substantial error, and the judgment or decree is correct, then the legal world is no better and no wiser, and sometimes it is made much less so, by the preparation and publication of opinions explaining the case, and answering the points of the losing party, especially as such points have already been effectually answered and disposed of in the court below. And it is because the writing of opinions which are unnecessary and useless only aggravates the evil of which I am speaking, that I again suggest, as has often been suggested before, that the judges should be relieved, or should relieve themselves, of such work.

A Common Pleas judge in one of our largest commercial cities, has for several years made it his practice, as I am informed, never to hold a case over night for consideration, never to write an opinion, and never to give a reason for a decision. And it was added by my informant, who was a prominent member of his bar, that his decisions were reversed less frequently, in proportion to the number appealed from, than those of any other judge in the State. And it was also said that

† *Beckford v. First, etc. Bank*, 42 Ill. 242.

§ *Merchants Bank v. Goodman*, 2 Atl. R. 687, 690; *Bank of Washington v. Triplett*, 1 Pet. (U. S.) 25; *Fahens v. Mercantile Bank*, 23 Pick. 330; *Dorchester Bank v. New Eng. Bank*, 1 Cush. 182; *East Haddam v. Scoville*, 12 Conn. 308; *Atina Ins. Co. v. Alton Bank*, 25 Ill. 247.

|| *Merchants' Bank v. Goodman*, *supra*.

¶ *Turner v. Dawson*, 50 Ill. 85.

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he did more business than any of his colleagues, of whom he had several, and gave better satisfaction to the bar.

The only cases in which, as it seems to me, the affirmance of a judgment or decree should be accompanied with a written opinion, are :

1st. When some new law has to be made or formulated, as in defining the rights of parties in commercial relations previously unknown ; or,

2nd. In correcting errors in the law as previously formulated, understood or applied.

Otherwise I see no good reasoning for the rendering of a written opinion in the affirmance of a judgment or decree.

It has been said, I know, that subordinate tribunals, while reaching a perfectly correct conclusion, sometimes give erroneous reasons therefor, and that it is a part of the duty of the Court of Review to correct the errors so made. This is true in cases where the court below has, by written opinion, duly reported, put its errors of reasoning into permanent form, so that an affirmance of the conclusion might be construed as an adoption of the reasoning by which it is reached. But these cases are rare, and, being exceptional, may be treated accordingly. But where the opinion of the court below is not reported, as it seldom should be, its errors of reasoning, the result being correct, should not be replied unto. It is no part of the duty of the judge of a Court of Review to act as a schoolmaster to instruct subordinate judges. His duties are to see that justice is administered in accordance with law in those cases which come before him on writ of error, by appeal or otherwise, to state new law, whenever occasion arises, and to modify or correct erroneous statements or applications of old law whenever such shall be found to exist. This being done, his duty in this regard is at an end. And if he does more, he is only aggravating an evil which has already become an intolerable nuisance.

I am aware that in this suggestion many of you will differ with me. I know from personal experience how desirable it is, after gaining on appeal the affirmance of a decree made below, to have a written opinion of the higher court, which shall in substance affirm the views entertained by

yourself, views on the basis of which you give advice, and in the following of which advice your client has risked a large investment or imperilled valuable rights. I know that it is exceedingly gratifying to a lawyer to know that his favourite and oftentimes important case of *Smith v. Jones* has a place in the authoritatively published reports of the land, and is cited with approbation by the bench and bar. Hence I expect your dissent, and merely suggest in reply, that personal considerations like these should give way to the public good.

The tendency to rely on cases and authorities, to the neglect of sound principles, is further aggravated by such publications as "Weekly Notes," abstracts of decisions, and the like. Convenient as they may be for the devotees of case-law practice, they are bad, and only bad, and bad all through, back again and cross-wise, as related to the making of good lawyers and sound practitioners. They create or foster an inordinate desire for the latest decision, for the newest point, for some novelty of rule or principle, to the disregard, neglect or forgetfulness of those fundamental principles which are, or ought to be, the basis of all decisions and all arguments. And I need only appeal to your own experience for cases in which opposing counsel, who have read an abstract of a late decision which you have not seen, wave it triumphantly before the court, and gently or aggravatingly hint that you are behind the times. And you, thinking you are, look carefully through "Weekly Notes" before you argue your next case.

I think of "Weekly Notes" much as Dr. O. W. Holmes does of medicines. If, with a very few exceptions, all the medicines in the world were thrown into the sea, it would be better for the human race, though far worse for the fishes.

The law-book publisher is the next great promoter of the evil of case practice. It is, and for many years has been, the custom with our leading Courts of Review, to order the official reporting of only such cases as they may deem worthy of preservation. It is a wise provision, and if the rule of exclusion had been applied more relentlessly the legal profession would be better off. But the bookmaker now steps in, and publishes everything

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rubbish and all. I do not know to what extent this abuse has reached our State Courts of Review, but from circulars which reach me, I learn that it soon will be here, as it now is with Federal Court decisions, as bad as it can be. Every written decision of every Federal Court in the nation, whether good, bad, or indifferent, whether of interest to everybody or to nobody, whether intelligible, as some are, or utterly meaningless, as many are, whether they contain good law, or bad law, or no law at all, all alike go into the hopper of the book mill, are ground out into book form, and the members of the profession have to foot the bill. And the evil has also reached State Courts of Review, to this extent, at least, that every opinion rendered in the highest courts of twenty-four States is now reported in full, and the rest are soon to follow. And the Territorial and District Court decisions are also going into the same mill.

I will not stop to characterize this abuse as it deserves, for there are worse things, professionally, yet before us. I received a few days ago a circular, which advertised the preparation and publication of professional briefs on a miscellaneous variety of subjects, which briefs are represented to contain each a full and exhaustive compilation of cases in support of a stated proposition of law; and as I now recall the statements of the circular, briefs would be prepared and furnished, for a consideration, on any point desired.

This, as it strikes me, embodies the perfection of case-practice, and is the fully developed fruit of a vicious system.

But the evil of case-practice has brought us another which is almost as bad, and if it continues as it seems likely to do, will certainly become worse. I refer to the text-book nuisance. Lawyers who argue solely or chiefly from adjudicated cases, instead of from legal principles, obviously are relieved from the necessity of much labour, which otherwise they would have to perform, if the cases are compiled for them. Labour-saving appliances exist outside of mechanics; and in the domain of law the book publisher is the fiend. A second or third-rate lawyer, first-rate, perhaps, as a compiler, is employed to prepare a text-book on some legal subject, the fundamental and governing principles of which he knows little or nothing about,

and would care nothing about, if he did know them. He presents a compilation of decisions, classified as regards subject-matter, and the most of our late text-books are of that kind, and not classified as they ought to be, in their relation to the governing principles of right and wrong which are involved. A classification purely by subject-matter is suitable for a digest; but it is utterly wrong and vicious as a system for use in a text-book. It is grossly wrong in that it fails to show any connection between the decision as made and the principle of right or of law which governs it. It is wrong in that it presents all decisions as equally broad in their scope and as of equally binding authority. It is fatally vicious in that it leads the student away from instead of to or toward the fountain head of all just decisions—the immutable principles of right and wrong. And it is still further bad in that the statements of law so presented are so meagre as often to be false and misleading, and in the hands of one who is purely a case lawyer, tend to promote litigation, instead of preventing it.

Time was when the preparation of text-books was the work of the ablest members of our profession. Apparently that time has gone by. With here and there an exception, text-books are now prepared as a branch of the bookmaker's art or business, by men, who, though members of the bar, are not lawyers in the proper sense of the term. They are too often mere compilers; and unfortunately, the use of such compilations by the ordinary practitioner makes him more of a case-lawyer than he was before, and aggravates the evil, which is already too great. And this tendency of our law-book publishers to publish anything and everything that will sell, is also an operative element in increasing the flood of published reports.

Now I do not say that a case-lawyer is necessarily a poor lawyer; but I do say that a lawyer who rests his case primarily on principle, and then, so far as may be advisable, backs up his position by showing from the authority of well considered and carefully adjudicated cases, that the same or like questions, embracing a consideration of the same or like principles, have been decided in accordance with the views by him then advanced,—I say that such a practitioner occupies a vantage

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ground dangerous to his opponent, and what is still more to the point, he is advancing the science of law, and making it more perfectly what it ought to be—the perfection of human reason. And the same characteristics I would seek in a good lawyer should, in a still greater degree, belong to a text-book writer. A knowledge of law as a science, and not as a system of statutory enactments and judicial decisions, an ability to state clearly and correctly the fundamental principles which underlie the law, and which make it an agency for good, and an aptitude in illustrating by orderly and systematic citation of decisions, how the law is and ought to be applied and enforced, and what is perhaps of equal importance, an ability to draw the lines by which to show where the particular principles under consideration cease to be applicable, and to make clear where and when decisions given have drawn dangerously near to or crossed such lines—these are characteristic qualities of a good text-book writer, which, unfortunately, are possessed by few, if any, of the writers of late years.

An old toper, it is said, once expressed the opinion that no whiskey was absolutely bad, though he admitted that some whiskeys were better than others. The same line of reasoning, though in a reverse direction, might be suggested as applicable to the bulk of our late text books. Most of them are bad, though it may be admitted that some are worse than others.

Our judges, of course, are recruited from the bar, and a bad training for lawyers results in correspondingly poor judges. And in defence of the crimes, or rather errors and mistakes charged against judges, I must say that I am only surprised that they do not make more. A man cannot help being what he is, when, under the training he received, he could not have been anything else. And a lawyer who is trained or trains himself to a subserviency to precedents and authorities, will, if he reaches the bench, be more or less a slave to them still. And then, when out of the mass of legal literature available, crude, undigested, confusing, contradictory and irreconcilable masses of law, or alleged law, are hurled at him by opposing counsel, is it any wonder that he should often make mistakes?

Only a few days ago I was present in court when a lawyer of almost a national reputation sent to the law library for between forty and fifty volumes, to use in an argument as to a question of priority of lien, under an unauthorized corporation mortgage.

One eminent Federal judge of my acquaintance, some years ago, became so exasperated with the indiscriminate citation and almost endless reading of authorities, that he finally refused to listen to any prior decision, unless the facts in the case cited to him were in most, or all material respects, the same as in the case at bar. The rule was a good one; and in the case which I was arguing before him, the application of the rule resulted in a considerable shortening of the argument; and so far as I could judge, the application of the rule worked no injustice as regards the final result.

I have neither the time nor the patience to collect the data by which to ascertain with exactness the total number of volumes of regular reports, issued in series, which are published in this country, and to which, as they are all accessible to him, the American case practitioner may be supposed to refer from time to time, either for purposes of offence or defence; but from readily accessible facts and figures, an approximately correct estimate can be reached.

The official reports of our own State Supreme Court now number one hundred and seventy volumes, and new ones are being issued at the rate of three per year. For the last forty years the issue has averaged a little over two and one-half volumes per year. Besides these, we have between ninety and one hundred volumes of miscellaneous reports, issued in regular series, and fifteen volumes of weekly notes. This gives us an aggregate of over two hundred and seventy-five volumes of law reports confined to cases adjudicated in the courts of the State of Pennsylvania alone. As like causes, under like conditions, produce like effects, it is fair to estimate that the growth and amount of this style of literature has been and is about the same in other States as in our own, and facts and figures readily attainable, fully sustain the correctness of this estimate. Hence, making all due allowance for the short period which has elapsed since some of our younger States



## THE EVILS OF CASE-LAW.

entered the race, the total aggregate of such reports for all the States of the Union will fall but little, if at all, below five thousand volumes, and probably exceeds that number. And in making this estimate I exclude digests, compilations of cases on special subjects, text-books and legal publications not devoted specially to the reporting of legal opinions. Nor have I taken into account the numerous volumes of decisions of the Federal Courts, Canadian and English decisions, all of which, if counted in, would make a wilderness of authorities, of which the general practitioner must take knowledge, for as they are all accessible to him, he cannot safely ignore them, nor any of them, for they are liable at any time to be cited against him in court. And the badness of some of them makes them so much the more dangerous. If they contained only good law, the evils resulting from their abundance and voluminousness would be materially lessened.

And I give these figures, not so much on their own account, as for a basis for the question, What of the future? This is where we are at the end of but little over a hundred years of our judicial history. Where will we be at the end of another hundred years? Or, having lived to the present age of the Mother Country, say a thousand years, what will then be the condition of our legal literature? With an expanding country, a growing population, increasing and multiplying, and interlacing and conflicting social and commercial relations, is this literature to increase and grow correspondingly, step by step, from year to year, and century to century? If five thousand volumes of reports alone be the product of the first century—or, in fact, taking the average life of all States of our Union, of a good deal less than a century, what may we expect in the second century, or in the tenth century, or the twentieth? If it keeps on, as it seems likely to, what, in the language of the old Sunday School hymn—

"What will the harvest be?"

Now, I do not pretend to say that all this plethora of reports, existing and prospective, is due solely to the evil of case-law practice; but I *do* say, without doubt or hesitation, that such is the food on which this great legal Cæsar feeds, and feeding on which, he is rapidly becoming

a public and professional nuisance. A few years ago, enquiries were common, "Will the coming man smoke?" or will he do this or that thing which was supposed or asserted to be incompatible with perfect manhood. Here and now, the like question is pertinent, Will the coming lawyer cite precedents, or discuss principles? Will the coming text-book writer reduce our modern law to a system founded on principles, or merely add several thousand additional authorities to the few thousand previously collated? Will the coming judge learn that, except as regards new questions or old errors, we have more law now than we know what to do with, and that the law-book publisher must in some way be suppressed?

My suggestions are these: That law as practised, or in a practical sense, is ceasing to be a science, and is becoming a system of technics.

That this evil, starting with case-practice, is aggravated by such practice, also by an unnecessary and useless excess of written opinions, prepared for publication and actually published, and still further by a vicious system of text-book writing, the latter resulting in part, at least, from the natural but pernicious desire of law-book publishers to make money.

And that this evil, now so serious at the end of but little over a century of our legal growth and development, is liable, if not checked or reformed, to work irreparable injury in a century or two more.

That the remedies lie with the members of the bar and law schools, in the training of law students; with examining committees and courts, in the demand for and exaction of higher attainments and qualifications for admission to the bar; with the judges, as regards the preparation of opinions, and with the judges and members of the bar at large, as regards methods of procedure and argument. I know of no way to checkmate and suppress publishers and compilers, except by the shot-gun remedy, which, however, as a remedy for this particular evil, has not as yet received the sanction of either statute-law or case-law. When it does, I have no doubt there will be willing hands to use it.

And for this purpose, when the time comes, if it ever does—I have a shot-gun to lend. And may God speed the day!—  
GEO. H. CHRISTY.

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NOTES OF CANADIAN CASES.

[Sup. Ct

**NOTES OF CANADIAN CASES.**PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.**SUPREME COURT OF CANADA.**

Ontario.]

**LANGTRY V. DUMOULIN.***Rectory endowments—Rectory lands—29 & 30  
Vict. c. 16—Construction.*

*Held*, affirming the judgment of FERGUSON, J. (7 Ont. R. 499), and the judgment of the Chancery Division of the High Court of Justice for Ontario (7 Ont. App. R. 644), that the lands in question in this case were covered by the terms of the Act 29, 30 Vict. ch. 16, entitled "An Act to provide for the sale of rectory lands in this Province."

*Held*, further, affirming the judgment of the Court of Appeal for Ontario (11 Ont. App. R. 544), that the said lands were held by the rector of St. James in the city of Toronto, as a corporation sole for his own use, and not in trust for the vestry and churchwardens, or parishioners of the rectory, or parish of St. James, and such vestry and churchwardens had therefore no *locus standi in curia*, with respect to said lands.

*Howland and Arnoldi*, for appellants.*H. Cameron*, Q.C., for Diocese of Toronto.*MacLennan*, Q.C., *Moss*, Q.C., for city rectors.*Hoskin*, Q.C., for township rectors.

Appeal dismissed with costs.

Ontario.]

**KINLOCH V. SCRIBNER.**

*Vendor and purchaser—Open and notorious sale—Actual and continued change of possession—R. S. O. cap. 119, sec. 5—Hiring of former owner as clerk.*

S. having purchased from one M. a trader, his stock in trade, merchandise and effects, took delivery of the keys of the premises in which M. had carried on business and entered into possession, and immediately advertised the business in his own name in the newspaper

of the place. The day after he so took possession he dismissed the clerk, who had remained after the change, and hired M. in his place, and M. continued for some time to sell goods in the store as he had done before the sale, but in the capacity of clerk to S.

*Held*, that notwithstanding the hiring of M. by the purchaser, there was "an actual and continued change of possession" in the goods in the store, which satisfied the requirements of R. S. O. cap. 119, sec. 5. See 12 Ont. App. R. 367.

*Ontario Bank v. Wilcox*, 43 U. C. R. 460, distinguished.

*McCarthy*, Q.C., and *Dougall*, Q.C., for the appellants.

*W. Cassels*, Q.C., and *Holman*, for the respondents.

Quebec.]

**MCGREEVY V. THE QUEEN.**

*Petition of right—46 Vict. ch. 27, (P. Q.)—Appeal to Supreme Court of Canada.*

*Held*, that the provisions of the Supreme and Exchequer Court Acts relating to appeals from the Province of Quebec apply to cases arising under the Petition of Right Act of the Province of Quebec, 46 Vict. ch. 27.

*Malhiot*, Q.C., for motion.*Irvine*, Q.C., contra.

Motion to quash dismissed with costs.

Ontario.]

**THOMSON V. DYMENT.**

*Contract for sale of lumber—Acceptance of part—Right to reject remainder as not being according to contract.*

T. contracted for the purchase from D. of 200,000 feet of lumber of a certain size and quality, which D. agreed to furnish. No place was named for the delivery of the lumber, and it was shipped from the mills where it was sawed to T. at Hamilton. T. accepted a number of car loads at Hamilton, but rejected others because a portion of the lumber in each of them was not, as he alleged, of the size and quality contracted for.

*Held*, affirming the judgment of the Court or Appeal for Ontario (12 Ont. App. R. 569), that T. had no right to reject the lumber, his only

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[Sup. C.]

remedy for the deficiency being to obtain a reduction of the price, or damages for non-delivery according to the contract. FOURNIER and HENRY, JJ., dissenting.

*Bain, Q.C., Kapelle with him, for appellants.*

*McCarthy, Q.C., for respondents.*

#### MCCALL V. McDONALD.

*Mortgage—Given in contemplation of insolvency—  
Suit by creditors to set aside—Parties to suit—  
Distribution of assets.*

C, a trader, mortgaged his stock, and a few days after executed an assignment in trust for the benefit of his creditors. On a suit by a creditor, on behalf of himself and the other creditors, except the mortgagees, to set this mortgage aside as a fraudulent preference in favour of the mortgagees.

*Held*, affirming the judgment of the court below, 12 Ont. App. R. 593, that the suit could be properly brought without joining the mortgagees as plaintiffs, and that the mortgage could be set aside without attacking the assignment in trust.

*Held*, also, reversing the decision of the court below, that the proceeds of the sale of the mortgaged property, which had been paid into court to abide the result of the appeal, should be paid over to the assignee under the trust deed to be distributed as part of the assets of the estate, and not dealt with by the court as ordered by the Court of Appeal. The decree of the Court of Appeal was varied, and the judgment of Ferguson, J., 9 O. R. 185, restored in full.

*Robinson, Q.C., and Geo. Kerr, for appellants.*

*Blake, Q.C., and McDonald, Q.C., for respondents.*

#### BEATTY V. NEELON.

*Company—Action by shareholders of, against promoters—Misrepresentation—Delay in bringing action—Parties injured.*

An action was brought by B and others, shareholders in a joint stock company, against N and others, who had been the promoters of the company, for damages caused by the fraudulent misrepresentation, as was alleged, the said promoters in the formation of the

company. The plaintiffs and defendants had been owners of rival lines of steamboats, and the plaintiffs claimed that the defendants had proposed to the plaintiffs to amalgamate the two lines and form a joint stock company, and as an inducement to the plaintiffs' consent to such amalgamation the defendants had represented that they had a four years' contract with the Government for carrying the mails from Windsor to Duluth, whereas the fact was that they had only a verbal contract for carrying such mails from year to year, which was discontinued after the formation of the company, which was the misrepresentation complained of, and also that the defendants had received a bonus from the town of Windsor, and refused to pay to the plaintiffs their portion of the same as agreed upon when the said company was formed.

The evidence on the trial showed that the plaintiffs had been aware of the true state of the said mail contract a short time after the company was formed, but had allowed the business of the company to go on for four years before taking proceedings against the promoters.

*Held*, Strong, J., dissenting, that the alleged injury, if any, was to the company and not to the plaintiffs, and the action should have been brought in the name of the company or on behalf of all the shareholders.

And *held*, also, affirming the judgment of the court below, 12 Ont. App. R. 50, that if the action could be brought by the plaintiffs the long delay and the conduct of the plaintiffs in allowing the business of the company to proceed without making a speedy claim for redress, disentitled them to relief.

*McCarthy, Q.C., and McDonald, Q.C., for the appellants.*

*Robinson, Q.C., and Cassels, Q.C., for the respondents.*

Q. B. Div.—Com. Pleas Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

## QUEEN'S BENCH DIVISION.

Wilson, C.J.]

[November 11.]

## REGINA V. ORGAN.

*Vagrant—Conviction—Evidence—32 & 33 Vict.  
ch. 28, sec. 1 (D.).*

The defendant was summarily convicted under 32 & 33 Vict. ch. 28, sec. 1 (D.), as "a person who, having no peaceable profession or calling to maintain himself by, but who does, for the most part, support himself by crime, and then was a vagrant," etc.

The evidence shewed that the defendant did not support himself by any peaceable profession or calling, and that he consorted with thieves and reputed thieves; but the witnesses did not positively say that he supported himself by crime.

*Held*, that it was not to be inferred that the defendant supported himself by crime; that to sustain the conviction there should have been statements that witnesses believed he got his living by thieving, or by aiding and acting with thieves, or by such other acts and means as shewed he was pursuing crime.

*Bigelow*, for the defendant.

## COMMON PLEAS DIVISION.

## REGINA V. MARTIN.

*Conviction—Beating a drum contrary to by-law—Offence.*

A conviction found that the defendant on the 16th May, 1886, created a disturbance on the public streets of the village of Lakefield by beating a drum, tambourine, etc., contrary to a certain by-law of the village. The information was in like terms, except that the act is said to have been done on Sunday, 16th May. The by-law under which the conviction was made was "the firing of guns, blowing of horns, beating of drums, and other musical or tumultuous noises on the public streets of Lakefield on the Sabbath day strictly prohibited." The evidence was of a person who said he saw defendant playing the drum on the street on the day in question.

*Held*, that the conviction was bad and must be quashed; for it should have alleged that the beating of the drum was without any just or lawful excuse.

## CHANCERY DIVISION.

[September 6.]

## BLACK V. BESSE.

*Exclusion of witnesses at trial—Witness remaining in court—Rejection of his evidence—New trial.*

At the trial of an action the witnesses were put out of court, and before the case was closed defendant's counsel tendered a witness who had remained in court, but the presiding judge refused to allow him to be examined. On a motion for a new trial it was

*Held*, per BOYD, C., that there must be a new trial.

*Per* PROUDFOOT, J.—The practice is to receive such evidence, but with care.

*S. H. Blake*, Q.C., and *J. W. McCullough*, for the motion.

*Chapple*, contra.

Divisional Court.]

[September 22.]

## HALL V. FARQUHARSON.

*Tax sale—Improper assessment—Payment of taxes—Non-resident lands—Admissibility of evidence to correct roll.*

H., being the owner of four islands, called them O., F., B. and C. islands, and improved O. by building a house, etc., on it. O. had previously been known to some people as island D., and was described by that name in the patent. H. ascertained what taxes he owed and paid all that were demanded. The assessor, from general information, assessed the islands, and so assessed island D. on the non-resident roll for the years in question. The taxes were not paid on island D., and it was consequently sold at a tax sale. In an action by H. to set aside the sale, in which it was shown that F. island was assessed by mistake as the improved island on the resident roll, and O. island on the non-resident roll as island D., it was

Prac.]

NOTES OF CANADIAN CASES.

[Prac

*Held* (affirming the judgment of FERGUSON, J.), under the provisions of the Assessment Act, R. S. O. c. 180, that as to errors in non-resident land assessments the county treasurer is not bound by the roll, but can receive evidence and correct errors therein; and that in this case he could have done so as to the "incorrect description," and the "erroneous charge" based thereon, and that the taxes were paid; and satisfactory proof being made on these points it would have been his duty to stay the sale, and if so, it is the duty of the court to interfere and undo the wrong. The Assessment Act recognizes the possibility of evidence being given to evade or neutralize entries upon the roll and official books. And the sale was set aside.

*McCarthy, Q.C., and Pepler, for the appeal.*

*McMichael, Q.C., contra.*

Divisional Court.]

[Nov. 17.]

GORDON ET AL. V. GORDON ET AL.

*Mortgage by executors—Mortgage by specific devisees—Priority—Amount found due by master not appealed against—Variation.*

The judgment of PROUDFOOT, J., reported *ante*, 11 O. R. 611, upheld in part.

By the court.—There should be no alteration in the amount found due by the Master when such amount was not appealed against.

*Moss, Q.C., for the appeal.*

*E. D. Armour, contra.*

## PRACTICE.

Ferguson, J.]

[Nov. 2.]

CAMPBELL V. MARTIN.

*Motion, enlargement of—Violating terms.*

The plaintiff asked an enlargement of a motion for the purpose of answering it by affidavits. The enlargement was granted upon terms, and it appeared when the motion came up again that the plaintiff had violated the terms.

*Held*, that the plaintiff was not entitled to read the affidavits.

*Hoyles, for defendant.*

*Holman, for plaintiff.*

Mr. Dalton, Q.C.]

[Nov. 5.]

Ferguson, J.]

[Nov. 8.]

## RE LEAK.

*Master in Chambers, jurisdiction of—R. S. O. ch. 120, sec. 23.*

The Master in Chambers has jurisdiction to entertain a motion under R. S. O. ch. 120, sec. 23, to annul the registry of a mechanic's lien, where the amount in question is over \$200.

*J. B. Clarke, for the land-owner.*

*F. E. Hodgins, for the lien-holder.*

Ferguson, J.]

[Nov. 8.]

## RE McDUGALL TRUSTS.

*Infants' money—Payment out of court—Directions of will.*

A sum of money left by McD. in his will to his daughter, who predeceased him, was paid into court by McD.'s executors. The daughter by her will had disposed of her moneys which she expected from her father's estate, leaving part to her husband and part to her infant children, naming her husband executor, and directing him to invest the infants' share and expend the interest for their maintenance. It was admitted by the official guardian on behalf of the infants that there was no reasons to anticipate danger to the money if paid out to the executor.

*Held*, that the will of the testatrix should be respected, and the infants' moneys paid out to the executor.

*Watson, for the executor.*

*J. Hoskin, Q.C., for the infants.*

Ferguson, J.]

[Nov. 8.]

## RE S—— INFANTS.

*Habeas corpus—Return—Infant, custody of—R. S. O. ch. 130, sec. 1.*

A return was made by the mother of the infants, in whose custody they were, to a writ of *habeas corpus* obtained by the father with the object of compelling the delivery of the custody to him. The return stated that the infants were all under twelve, the age mentioned in R. S. O. ch. 130, sec. 1.

## LAW STUDENTS' DEPARTMENT—REVIEWS.

*Held*, upon demurrer, that the return must be considered in the light, not only of the common law, but of the statutory provisions with regard to the custody of infants, and that the return was sufficient in law.

*Re Murdoch*, 9 P. R. 132, explained and followed.

*J. MacLennan*, Q.C., and *H. J. Scott*, Q.C., for the father.

*S. H. Blake*, Q.C., and *H. Cassels*, for the mother.

[By a slip in the printing office the name of the first case on p. 386 *ante*, was omitted. Please insert *Furlong v. Reid*.]

## LAW STUDENTS' DEPARTMENT.

"I WILL"—A question that troubles young lawyers is where to locate and what branch of practice to select. This puzzle lasts even into middle life with many able men, and some never solve it—life itself is an unsolved riddle.

There is a place for every one of genius and ability somewhere, and only let him say, *I will reach it*, and he is half to it already. Men live where their hopes are, and prosper when they *will* prosper. Men invent when they have courage to think out problems alone and advance them. The man who surrenders to a theory like this: I'm only a little moth around the candle of the earth, burning my wings with each flutter, and doomed to fall unknown and early into an unforgotten hereafter, is very likely to do so—he is halfway on the journey.

Men who have within them the *I will be a lawyer and a good one*, the *I will live happily, battle bravely*, the *I will succeed*, must make a bright mark some day, for such lives are never failures; they are heard of, marked, remembered. "Make up your mind to have a front seat in life, and you attract to you the powers that carry you to it."

Confidence in yourself, the "I will" is everything. Look at the leaders of great enterprises! They seem to care little for competition; most of them are sharpened by it. They aspire to be first, and the first is ever just ahead of them. They have already half reached it when once fairly started. *Think* to the front and you will get to the front; lag to the rear and it is ever ready for you.

Get out of the notion that the man who cites the

most law and reads the most reports, is the best lawyer. No man carried less books to court than did Carpenter, but he carried his manhood there always, his clear insight was thought out by himself, and his facts applied to principles and results demanded. It is not the most learning but the best wisdom that wins. What a weak ambition one must have to spend a life-time in dreaming over the prospects of personal failure! Why not anticipate success and aim for it? The courage of the *I will lawyer* secures him, first standing room; next an opening, and then, early, a front seat in the ranks of his profession. If you never have set your heel down with emphasis, in an "I will" determination to win, the sooner this resolution is reached the nearer you will be to the goal of ambition. The hand is never stronger than the heart, and the man is never greater than his mind. His life is below or above his true condition, very much as he wills it, and no one will cheer him till he wins something worthy of applause. The world is both stingy and liberal, reluctant to risk on uncertainty, and willing to advance thousands on ventures when successful. The demonstration of success is what they wait for and demand.—*Central Law Journal*.

## REVIEWS.

A MANUAL ON THE LAW AFFECTING VOTERS' LISTS FOR LEGISLATIVE AND MUNICIPAL ELECTIONS IN ONTARIO. By Thomas Hodgins, Q.C. 2nd Edition. Toronto: Carswell & Co., 1886.

WE owe an apology to the learned editor for not referring before this to the volume before us. Its value is well known to many who, since its publication, have made practical use of it.

Mr. Hodgins' name is well known in connection with all matters touching the franchise, and elections; and the second edition of his manual keeps up the good reputation he had previously earned for himself as an intelligent and industrious annotator on those important subjects.

This book contains the Voters' Lists Act (R. S. O. cap. 9); the Voters' Lists Finality Act, 1878; the Voters' Lists Amendment Act, 1879; the Voters' Lists Amendment Act, 1885; the Franchise Clauses of the Election Act, amended by the Franchise and Representation Act, 1885; together with an appendix containing the opinions of the judges of the Court of Appeal on cases under the Voters' Lists Acts, and a schedule of forms.

As the writer says, whilst the franchise for legislative elections has been gradually approachin

## REVIEWS.

manhood suffrage, the municipal franchise has remained as fixed in 1873, subject to the changes made in 1874, 1877 and 1884, as to income voters, farmers' sons and women voters. Whatever may be said as to manhood suffrage in legislative action, it would be contrary to common sense that, in the expenditure of municipal taxes and the management of our local affairs, the person who pays nothing towards the taxes, and has no stake in the country, should have as much to say in the election of representatives as the man who owns large properties and pays heavy taxes. Beyond all question, there should be some representation of property. Why should not some such principle as that adopted in voting on shares in a joint stock company be adopted; so that large taxpayers should have a proportionate voice in the money they pay into the general treasury. In connection with this we read with interest the editor's notes on pp. 7 and 141, where he shows that manhood suffrage was in a sense the common law franchise of England, but under a very different state of things from what exists now.

Clerks and assessors will look upon the book as a boon to them as well as all others who have duties to perform under the Act. Their duties are specially referred to at pp. 3 and 89, and incidentally in other places.

The practical suggestions for the revision of voters' lists, with definitions of the various classes of voters, are very useful features of the book, and happy is the political party at the present crisis which has given most heed to the hints there given.

Most valuable will be found the appendix containing the opinions (ten in number) of the judges of the Court of Appeal on questions submitted by them under 41 Vict. cap. 21, sec. 11. Head notes carefully drawn give the pith of the decisions.

SUPPLEMENT TO THE CANADIAN FRANCHISE ACT, 1885, containing the Amending Act of 1886, with explanatory notes by Thomas Hodgins, M.A., Q.C. Toronto: Rowsell & Hutchison, Law Publishers, 1886.

The first thing that meets our eye after the Index of Cases is a Table of the Electoral Franchise. A prominent politician has publicly pronounced the present Franchise law as "anomalous, contradictory, artificial and almost incomprehensible." Without discussing this subject, though many will agree with him, Mr. Hodgins has done his best to make it, at least, "comprehensible;" and to make the matter as clear as we can to the reader we take the liberty of copying this table.

TITLE OF VOTER.	OCCUPATION OF PREMISES OR RESIDENCE IN THE ELECTORAL DISTRICT.	VALUE.	
<i>Real Property Franchise.</i>			
(1) <i>Owner—</i> (a) in his own right ..... (b) in right of wife ..... (c) his wife own'r .....	Ownership prior to or at the date of the revision of the Voters' Lists .....	Cities, \$300. Towns, \$200.	
(2) <i>Occupant—</i> (a) in his own right ..... (b) in right of wife ..... (c) his wife occupant .....		Other places \$150	
(3) <i>Farmer's Son—</i> (a) Father own'r ..... (b) Mother own'r .....		Both occupation and residence for one year next before: (1) the date of his being placed upon the List of Voters; or (2) the date of the application for the placing of his name on the List of Voters .....	Farm, or other real property, if equally divided among the father and sons, or (if mother the owner) among the sons, sufficient, according to the above values, to give each a vote.
(4) <i>Owner's Son—</i> (a) Father own'r ..... (b) Mother own'r .....			
(5) <i>Tenant—</i> .....			
(6) <i>Tenant-farmer's Son—</i> (a) Father tenant ..... (b) Mother tenant .....		\$2 monthly, or \$6 quarterly, or \$12 half yearly, or \$20 yearly.	
(7) <i>Fisherman (owner)</i> ..... (8) <i>Indian</i> .....	Prior to or at the date of the revision of the Voters' List .....	\$150, land, boats, fishing tackle, etc. \$150 of improvements.	
<i>Income Franchise.</i>			
(9) <i>Income</i> .....	Prior to or at the date of the revision of the Voters' List, and one year's residence in Canada ...	\$300 a year.	
(10) <i>Annuitant</i> .....	Residence for one year prior to the revision of the Voters' Lists .....	\$200 a year.	

The editor notes as he goes along, the alterations made by the Amending Act, so that one can tell at a glance what the law was and is. Mr. Hodgins has evidently spared neither time nor trouble in giving the result of his research. A number of useful forms and a full index complete this useful little book.

## ARTICLES OF INTEREST—FLOTSAM AND JETSAM.

## ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

Common words and phrases. (Abutting—Account—Balance—Cut—Family—Funds—Habitual drunkard—Household goods—Intoxicants—Necessary appendage—Peddler, merchant—Produce—Pecuniary ability—Dwelling house—Bond—Wanton—Drainage, sewerage.)—*Albany L. J.*, Aug. 7.

Life tenant and remainderman.—*Ib.*, Aug. 21.

The enforcement of usurious foreign contracts.—*Ib.*, Sept. 25.

Foreign administrators and executors.—*Ib.*, Oct. 2.  
Damage caused by felony.—*Irish Law Times*, Aug. 7.

Niceties of distress for rent.—*Ib.*, Aug. 14.

Malicious prosecution against corporation aggregate.—*Ib.*, Sept. 11.

Expulsion from a club.—*Ib.*, Sept. 18.

Variance between recitals and operative part of a deed.—*Ib.*, Oct. 2.

The husband and his wife's torts.—*Law Journal* (England), Sept. 18.

Mortgages from client to solicitor.—*Ib.*

Rights and liabilities of sureties on official bonds.—*Central Law Journal*, Aug. 6.

Carriers' servants.—*Ib.*

Principal and agent—Rules as to purchase by agent of principal's property.—*Ib.*

Excusable negligence—What will relieve the maker of a negotiable instrument from his liabilities to a *bona fide* purchaser.—*Ib.*, Aug. 13.

Personal liabilities of bank officers.—*Ib.*, Aug. 20.

Trustee purchasing trust property.—*Ib.*

Banking—Effect of bank certifying cheque.—*Ib.*

Formalities as essential to the validity of a marriage.—*Ib.*, Sept. 3.

Liability of the property of married women on mechanics' lien.—*Ib.*, Sept. 10.

Injunction to restrain a creditor's proceedings in a foreign jurisdiction.—*Ib.*, Sept. 17.

Liabilities of a married woman for improvements to her separate real estate.—*Ib.*, Sept. 24.

Liability of a master to a servant injured by the negligence of fellow-servant.—*Ib.*, Oct. 1.

Carrying concealed weapons.—*Criminal Law Mag.*, October.

Oral wills and death-bed gifts.—*Law Quarterly Review*, October.

Useful law studies.—*Ib.* (Reprinted *ante* p. 366.)

The Government of Ireland Bill and the sovereignty of Parliament.—*Ib.*

Liability of railway company in relation to passenger's luggage.—*Ib.*

The mystery of seisin.—*Ib.*

## FLOTSAM AND JETSAM.

CAUSE AND EFFECT.—"I hear," said some one to Jeckyll, "that our friend Smith the attorney is dead, and leaves very few effects." "He could scarcely do otherwise," returned Jeckyll, "he had so very few causes." This is as old as the hills—old enough to be quite new to the junior class.—*Ex.*

THE INFERIOR MAGISTRATES.—At the urgent request of several interested parties, Dr. Wicksteed will print a second edition of his pamphlet on "The Inferior Magistrates"—the first edition of five hundred copies having been exhausted.

The object of this work is to obtain the separation of the magistracy from the practising bar. The pamphlet has been highly spoken of by the editors of law publications. It is looked upon by those who have read it as an able and clear exposition of this most important question. The Hon. Mr. Mowat himself wrote a complimentary letter to the author, but declined, for reasons assigned, to amend the law in the direction sought for.

It is not too much to expect that the next Parliament of Ontario will put an end to the anomaly complained of.—*Evening Journal. Ottawa.*

TOO MUCH FOR THE JURY.—The following plan is stated to have been pursued by some officials at the late Worcester Sessions to hasten the decision of a refractory jury who were locked up to consider their verdict. It was past supper time, and the court officials had no relish to pass the night waiting upon the twelve good men who were so excessively conscientious. A large dish of beef-steaks fried with onions, giving off a body of aroma sufficient to fill the largest hall in England, was brought into the passage close to the door of the unhappy journeymen's prison. The bailiff, who wished the "stand-outs" at Jericho, opened the door; the cover was taken off the dish; the aroma of the steaks and onions floated in; it invaded and pervaded every square inch of the black hole; and the jury's nasals were violently affected. Mere mortal Englishman couldn't long stand out against such a remembrance of supper. A second opening of the door and advancement of the dish enabled the jury to find a verdict.



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# Canada Law Journal.

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DECEMBER 15, 1886.

No. 22.

## DIARY FOR DECEMBER.

15. Wed.....Christmas vacation in Sup. Ct. of Can. and Exch. Ct. begins.  
19. Sun.....1st Sunday in Advent.  
22. Wed.....Shortest day.  
24. Fri.....Christmas vacation begins in H. C. J.  
25. Sat.....Christmas Day Sir M. Hale died 1676, æt. 67.  
26. Sun.....1st Sunday after Christmas.  
27. Mon.....First meeting Ont. Leg. '67. J. G. Spragge, 3rd Chan. '69.  
28. Tues.....Lord Macaulay died 1859.  
29. Wed.....W. E. Gladstone born 1809.  
30. Thur.....Holt, C. J., born 1642.

TORONTO, DECEMBER 15, 1886.

## RECENT ENGLISH DECISIONS.

We continue the cases in the November number of the *Law Reports* :—

### STATUTE OF LIMITATIONS—MORTGAGE—PAYMENT OF INTEREST—EVIDENCE.

*Newbould v. Smith* has already been referred to, *ante* p. 373, on the main point. The case, however, gives light on another. The defendant's assignor, in 1863, had mortgaged to one Alderson, a client of Newbould's. Newbould paid interest on this mortgage, and charged the mortgagor with it in account till 1866. After 1866 Newbould went on paying interest to Alderson, who believed it came from the mortgagor, but it was not shown that Newbould had ever acted as solicitor for the mortgagor after 1866; nor was there anything to show that Newbould was authorized to make the payments as agent for the mortgagor; and it was therefore held that the payments by Newbould after 1866 did not take the case out of the Statute of Limitations, and it was also held that a letter from Newbould to Alderson, stating that he had paid to the latter's account a sum received from the mortgagor for interest, was not an admission against interest so as to be admissible as evidence of payment by the mortgagor.

### AMOUNT OF LAND BOUNDED BY RIVER—GRANT OF HALF OF BED OF RIVER.

The facts in the case of *Micklethwait v. Newlay Bridge Co.*, 33 Chy. D. 133, are some-

what difficult to follow without the aid of a chart. The principal point in contention was whether a grant of land on one side of a river by a person who owned the land on both sides of the river, carried with it the right to half the bed of the river. The Court of Appeal (reversing an order for an injunction granted by Bacon, V.-C.) held that the deed containing no reservation, and describing the lands as bounded by the river the presumption that the grant extended to half the bed of the river was not rebutted because circumstances afterwards arising, but which were not in contemplation of either party at the time of the grant, showed that it would be disadvantageous to the grantor to part with the half-bed, and, if contemplated, would probably have induced him to have reserved it. Nor yet by the fact that the area of the land conveyed was stated to be 7,752 sq. yds., and to be delineated on a plan drawn on the deed, and thereon coloured pink; whereas the part coloured pink extended only up to the edge of the river, and the area including the half bed was, in fact, 10,031 sq. yds. instead of 7,752.

Cotton, L.J., thus states the rule of construction followed in this case, at p. 145 :

In my opinion the rule of construction is now well settled, that where there is a conveyance of land, even although it is described by reference to a plan, and by colour, and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument half the bed of the river, or half the road passes, unless there is enough in the circumstances, or enough in the expressions of the instrument, to show that that is not the intention of the parties. It is a presumption that not only the land described by metes and bounds, but also half the soil of the road or of the bed of the river by which it is bounded is intended to pass, but that presumption may be rebutted.

It is perhaps needless to say that his observations, so far as public highways are concerned, do not apply in this Province. Another point determined in the case was, that a proviso that nothing in the grant should take

## RECENT ENGLISH DECISIONS.

away the grantor's right to take tolls over his bridge, which connected the land conveyed with the grantor's land on the other side of the river, did not preclude the grantee from taking away custom from the grantor's bridge by the erection of a new bridge; and the reservation to the grantor of a right to enter on the land conveyed for the purpose of repairing his bridge did not preclude the grantee from erecting a new bridge, so long as its erection did not interfere with the grantor's reasonable access for the purpose of repairing his bridge.

## PRACTICE—ACTION TO PERPETUATE TESTIMONY—DEFAULT OF DEFENCE—EVIDENCE HOW TAKEN.

*Bute v. James*, 33 Chy. D. 157, was an action to perpetuate testimony, and the defendant having failed to deliver any defence, a question arose as to how the action was to proceed. The plaintiff moved for an order that the action might proceed notwithstanding the default of the defendant in not delivering a statement of defence, and asked the appointment of a special examiner to take the evidence of the plaintiff's witnesses, as if the pleadings were closed. Bacon, V.-C., made the order for leave to proceed, but refused to name a special examiner, and directed the examination to be taken before one of the official examiners.

## TRUSTEE—SOLICITOR TRUSTEE—PROFIT COSTS.

The point involved in *re Corsellis*, *Lawton v. Elwes*, 33 Chy. D. 160, was whether a solicitor, who was one of two trustees under a will containing no power authorizing him to charge for professional services, was entitled to charge profit costs against the trust estate of legal proceedings in which the trustees were parties, and in others which the solicitor trustee, as surviving trustee, alone was a party, and which had been conducted by the firm of solicitors of which he was a partner, and their London agents. It was held by Kay, J., upon the principle that a trustee is bound to check all charges against the estate, and must not place himself in a position where his interest conflicts with his duty, that none of such profit costs ought to be allowed out of the estate to the firm of which the solicitor trustee was a member. There was also a further point determined in the case. The trustees appointed a partner of the solicitor trustee to be steward

of a manor which was part of the trust estate, and fees for manorial business were paid by the tenants of the manor to the partner as such steward, a share of the profit costs of which was claimed by the solicitor trustee, who also claimed a share of certain profit costs paid to his firm by lessees and others in respect of leases and agreements for leases of portions of the trust estate granted by the solicitor trustee, and prepared and carried out by him or his firm. Mr. Justice Kay held that neither the solicitor trustee nor his firm were entitled to any of such profit costs, but that the solicitor trustee must account to the trust estate therefor.

It will be observed that in the latter branch of the case the profit costs were not payable out of the estate, but had been paid by third parties, and the court not only deprives the solicitor trustee of all right thereto, but compels him to account for them to the trust estate, in which respect it seems to carry the law against a solicitor trustee deriving any profit from his trust to a point beyond what our own courts seemed disposed to do in *Meighen v. Buell*, 25 Gr. 604, where it was considered, not without doubt, that there was a distinction between costs payable out of the estate and costs payable by third parties.

## COMPANY—WINDING UP ORDER—JURISDICTION—FOREIGN COMPANY WITH BRANCH OFFICE IN ENGLAND.

A question which has been frequently considered of late in our own courts came up for consideration in *re Commercial Bank of S. Australia*, 33 Chy. D. 174, viz., the jurisdiction of the court to make a winding up order against an Australian company having a branch office in England. Two petitions were presented by English creditors, and on the hearing of the petitions an order had been made appointing a provisional liquidator whose powers were limited to the taking possession of, and collecting and protecting, the assets of the company in England, and the further hearing of the petitions was adjourned for a time. When they came on again to be heard it appeared that a petition to wind up the company had in the meantime been presented in Australia, and that a provisional liquidator had been appointed there; but it was not proved that a winding up order had been made there, and it was held by North, J.,

## RECENT ENGLISH DECISIONS.

that there was jurisdiction at the time the petition was first presented to make the order, and that the jurisdiction could not be affected by the subsequent proceedings in Australia, and a winding up order was accordingly made, limiting the powers of the provisional liquidator to the English assets; the learned judge expressing the opinion that the winding up in England would be ancillary to a winding up in Australia, and that if the circumstances remained the same the powers of the official liquidator ought to be restricted in the same way.

**TRUSTEE AND CESTUI QUE TRUST—RIGHT OF CESTUI QUE TRUST TO PRODUCTION OF TITLE DEEDS.**

*In re Courin, Courin v. Gravett*, 33 Chy. D. 179, it was determined by North, J., that a *cestui que trust*, though only interested in the proceeds of a sale, has a *prima facie* right to the production and inspection of all title deeds and documents relating to the trust estate which are in the possession of the trustees; and one *cestui que trust* can enforce this right against the trustees without bringing the other persons beneficially interested before the court when they have no higher right than himself.

**WILL—MORTGAGED ESTATE—INCUMBRANCE—EXONERATION—LOCKE KING'S ACT (17 & 18 VICT. c. 118).**

*In re Smith, Hannington v. True*, 33 Chy. D. 195, is a decision under Locke King's Act (see R. S. O. c. 106 s. 36). A testator, the whole of whose real estate was subject to a mortgage, after directing payment of his debts devised a freehold house to his wife absolutely, "to do with as she thinks proper"; and he directed his executors to sell whatever other freehold property he possessed, and collect all debts due to him, and apply the proceeds in payment of certain legacies. The question was whether the devise to the wife showed "a contrary or other intention," so as to exclude the operation of Locke King's Act, so as to make the other real estate primarily liable for the mortgage debt. North, J., held that it did not, and that the house devised to the wife must bear its rateable proportion of the mortgage debt.

**WILL—CONSTRUCTION—SUPPLYING OMISSION BY INFERENCE.**

The case of *Mellor v. Daintree*, 33 Chy. D. 193, is an illustration of the extent to which

the court will go in supplying by inference an apparent omission in a will. The scheme of the will in question appeared to be a division by the testator of his estate between two persons. As to one moiety the will expressly provided that the devisee should become absolutely entitled in case he should attain twenty-five, but in the disposition of the other moiety this provision was omitted, though in other respects the terms of the devise was similar. The omission, North, J., held, might be supplied by inference.

**MORTGAGE—CONSOLIDATION.**

The case of *Bird v. Wenn*, 33 Chy. D. 215, is a decision of Stirling, J., upon the question whether a mortgagee was entitled to consolidate his mortgages as against a subsequent incumbrancer under the following circumstances: The plaintiff was third mortgagee of a leasehold property, A, on which there was a first mortgage to a company of £1,000. The company subsequently took a mortgage on a property, B, from the same mortgagor. The lease of A was nearly out, and by arrangement between all parties the company advanced £1,000 for a new lease which was granted to the mortgagor, and was then mortgaged by him, first to the company to secure £2,000 and advances, and subject thereto to the plaintiff. By a memorandum between the company and the plaintiff, given at the time, it was agreed that the company was to have priority for their £2,000, and advances not to exceed in the whole £2,300. The mortgage to the company stipulated that the restriction on the consolidation of mortgages created by the Conveyancing Act of 1881 should not apply to the securities held by the company for the moneys due from the mortgagor. The company having assigned both mortgages on A and B to the defendant, he claimed the right to consolidate them as against the plaintiff who brought his action to redeem property A. Stirling, J., held that the defendant had no greater right than his assignors, and as the latter could not have required the plaintiff to redeem both mortgages, so neither could the defendant.

**HUSBAND AND WIFE—EQUITY TO SETTLEMENT—MISCONDUCT OF HUSBAND.**

*Reid v. Reid*, 33 Chy. D. 220, is another decision of Stirling, J. The plaintiff was en-

titled to £1,500. The action was brought claiming to have the whole fund settled on the usual trusts for herself and children; her husband had disregarded an order of court for restitution of conjugal rights, and had stated that he and his wife should not again live together. Under these circumstances it was held that the conduct of the husband amounted to aggravated misconduct so as to entitle the wife to have the whole fund settled.

**COSTS—NEXT FRIEND—REVERSION.**

The only remaining case to be noted is *Damant v. Hennell*, 33 Chy. D. 224, which was an action brought by an infant plaintiff by his next friend for the protection of a trust fund in which the plaintiff had only a reversionary interest, and a question arose as to how the solicitor and client costs should be paid. Stirling, J., made an order that the costs of the plaintiff should be taxed as between solicitor and client—the taxing officer to distinguish which of such costs are party and party—that the next friend should have his party and party costs out of the fund forthwith, with liberty to apply for the difference when there is a fund to which the plaintiff is absolutely entitled.

**NOTES OF CANADIAN CASES.**

PUBLISHED IN ADVANCE BY ORDER OF THE  
LAW SOCIETY.

**SUPREME COURT OF CANADA.**

[Ontario.]

THE ATTORNEY-GENERAL OF ONTARIO,  
Appellant, and

THE ATTORNEY-GENERAL OF CANADA,  
Respondent.

*Statement of claim in Exchequer Court—Insufficiency of—Summons to fix trial and hearing discharged—Appeal to Exchequer Court from order of a judge in chambers.*

A statement of claim was filed by the Attorney-General for the Province of Ontario in the Exchequer Court of Canada, praying that "it may be declared that the personal property of persons dying, domiciled within the Province of Ontario, intestate and leaving no next of kin or other person entitled thereto, other than Her Majesty, belongs to the Province or to Her Majesty in trust for the Province." The Attorney-General for the Dominion of Canada in answer to the statement of claim made prayed, "that it be declared the personal property of persons who have died intestate in Ontario since Confederation, leaving no next of kin or other person entitled thereto except Her Majesty, belongs to the Dominion of Canada, or to Her Majesty in trust for the Dominion of Canada."

No reply was filed, and on an application to Mr. Justice Gwynne in chambers for a summons for an order to fix the time and place of trial or hearing, the summons was discharged on the ground that the case did not present a proper case for the decision of the court. A motion was then made before the Exchequer Court, Sir W. J. Ritchie presiding, by way of appeal from the order of Mr. Justice Gwynne, for an order to fix the time and place of trial. The motion was dismissed without costs, on the ground that he was not prepared to interfere with the order of another judge of the same court.

Sup. Ct.]

NOTES OF CANADIAN CASES.

[Sup. Ct.

On appeal to the full court,

*Held*, affirming the decisions appealed from, that the pleadings did not disclose any matter in controversy in reference to which the court could be properly asked to adjudge, or which a judgment of the court could affect.

Appeal dismissed without costs.

*Irving, Q.C.*, for appellant.

*Burbidge, Q.C.*, for respondent.

Nova Scotia.]

CONFEDERATION LIFE ASSOCIATION OF  
CANADA V. O'DONNELL.

*Life insurance—Delivery of policy—Escrow—Instructions to agent—Policy not countersigned—Payment of premium—Admissibility of evidence—Entry in books of deceased against interest.*

In an action on a policy of life insurance the defence was that the policy was never delivered, that it was not countersigned by the agent, contrary to a condition upon its face, and that the premium was never paid. On the trial an entry in the books of a payment to the agent was received in evidence, and the statement of the agent, made at a former trial, that the premium was not paid, was allowed to be read, the agent having since died.

The policy offered in evidence contained the following condition :

"This policy is not valid unless countersigned by——, Agent at——. Countersigned this —— day of ——, Agent.

The evidence of the agent which was read, in addition to stating the non-payment of the premium, was to the effect that the policy was only delivered to the deceased to be examined, and that he did not countersign it because it was not actually delivered. The jury found a verdict for the plaintiff, but included in it a finding that the agent was instructed not to deliver the policy until it was countersigned. The Supreme Court of Nova Scotia sustained the verdict. On appeal to the Supreme Court of Canada,

*Held, per RITCHIE, C.J., and GWYNNE, J.*, that the policy was in the agent's hands merely as an escrow, not to be delivered until countersigned, and that condition not having been complied with, it was never an instrument

duly executed and delivered by which the defendants could be bound.

*Per STRONG, J.* That the entry in the books of the deceased as to payment of the premium was improperly received in evidence, and there should be a new trial.

*Per HENRY and FOURNIER, JJ.* That the countersigning of the policy was not a condition to which it was subject, and the defendants are estopped from denying that the premium was paid; and the jury having found that the policy was delivered, the plaintiff is entitled to retain his verdict.

The court being thus divided in opinion, a new trial was granted.

The report of this case on a former appeal will be found in 10 Can. S. C. R. 92.

*Beatty, Q.C.*, and *C. H. Tupper*, for the appellants.

*Weldon, Q.C.*, and *J. H. Lyon*, for the respondent.

Manitoba.]

FEDERAL BANK OF CANADA V. CANADIAN  
BANK OF COMMERCE.

*Writ of execution—Payment of amount to sheriff—Application of proceeds—Interest of third party in defendant's lands—Interpleader.*

In August, 1881, the H. B. Co. executed an agreement for the sale of certain lands to A. In March, 1883, A. conveyed the land to R., manager of the Federal Bank. The trustees of a church corporation wishing to purchase the land, R. re-conveyed it to A., to enable him to get a deed from the Co., and A., on Aug. 4th, 1883, having obtained such deed, executed a deed to said trustees. It was agreed that the bank should receive a portion of the purchase money from the church. On the same day that the deed to the trustees was executed the Bank of Commerce, having a judgment against A., placed an execution in the sheriff's hands. The trustees paid to the sheriff the amount of the execution, believing that the same was a charge upon the land bought from A., and received a certificate from the sheriff that the land was free from execution. The Federal Bank gave notice to the sheriff that they claimed the money, and an interpleader order was issued to try out the title to it.

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

*Held*, affirming the decision of the court below, 2 Man. L. R. 257, that the money having been paid to the sheriff on an execution duly issued must be paid to the execution creditors, and a third party could not claim it.

*Semble*, that the lands were neither "taken or sold" within the meaning of the Interpleader Act, and the proceedings were therefore improper.

Appeal dismissed with costs.

*McCarthy*, Q.C., for appellant.

*Robinson*, Q.C., for respondent.

### CHANCERY DIVISION.

Proudfoot, J.]

[Oct. 23.]

#### ARCHER V. SEVERN.

*Will—Specific bequest of a mortgage indebtedness—Right of executors to refuse to discharge until other indebtedness paid—Assent of executor to specific legacy—Administration proceedings.*

A testator by his will directed his executors to cancel and entirely release the indebtedness of his son, W. S., upon and by virtue of a mortgage to the testator, such release to operate and take effect immediately on and from the said testator's death. In an action for the administration of the testator's estate W. S. claimed the discharge of the mortgage, but the executors contended that they were not bound to give it until W. S. paid the amount of his other indebtedness to the estate. The master found in favour of the executors. On appeal from the master it was

*Held*, that the executors were not entitled to insist on payment of the other indebtedness before discharging the mortgage.

*Held*, also, following *Northy v. Northy*, 2 Atk. 77, that although at law the assent of the executor is necessary to the vesting of a specific legacy, in equity he is considered as a bare trustee, and if he refuse his assent without cause he may be compelled to give it, and that here the executors' refusal was without cause.

*Held*, also, that a decree in an administration suit, although it may enure to the benefit of all creditors of an estate, does not prevent the statute of limitations from running against debtors to the estate.

*Held*, also, that a clause in the answer of W. S. expressing his willingness that the will should be construed by the court, and the rights of the parties thereunder determined had not the effect of waiving any right that might have accrued to him during the progress of the suit.

*W. H. P. Clement*, for the appeal.

*S. H. Blake*, Q. C., and *H. Cassels*, contra.

Ferguson, J.]

[Nov. 29.]

#### HOLMES V. MURRAY.

*Will—Devise—Republication of will by codicil—Mortmain—R. S. O. c. 216—38 Vict. c. 75 (O.).*

A testator made his will, dated February 2, 1884, in which was contained the following devise:—"To the congregation of Burns Church. . . . I bequeath the sum of \$2,000, to be used by the trustees of the said church towards the purpose of purchasing land for a glebe, in any place that they may judge suitable, and for erecting thereon a manse, all for the use of the said congregation through their trustees forever." He added two codicils on September 21st and December 5th, 1885, respectively, and died on the 27th of December following.

*Held*, that as nothing appeared in the codicils to show a contrary intention, their executions operated as republications of the will at their respective dates, and that the will having been so republished within six months of the death of the testator the gift, notwithstanding the provisions of R. S. O. c. 216, and 38 Vict. c. 75 (O.), was void.

*Oliver*, for the plaintiffs, the executors.

*MacLennan*, Q.C., for the defendants, the trustees.

Ferguson, J.]

[Nov.]

#### RE ONTARIO LOAN AND SAVINGS Co. AND POWERS.

*Will—Devise—Appointment—Estate—R. S. O. c. 109.*

A. by his will devised as follows:—"I give and bequeath to my nephew B., and C., his wife, (describing the land) to their use for the term of their natural life, and at their decease

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NOTES OF CANADIAN CASES.

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to be divided among their children as they may see fit." C., the wife, died, and after her death B. conveyed to one of his children, D. B. and D. then mortgaged to the company, and the company sold to E. under the power of sale in the mortgage, but E. refused to take the company's title.

*Held*, that B. and C. took an estate for life only, that the appointment in favour of one child to the exclusion of the rest was not a valid appointment, and that the title offered was not one that the purchaser could be compelled to accept.

S. H. Blake, Q.C., for the vendors.

Robert Armour, for the purchaser.

Proudfoot, J.]

November 22.

### MCMULLEN v. POLLEY.

*Principal and agent—Solicitor and client—Right of solicitor to receive money for client.*

M., a solicitor, on the pretence of obtaining an advance of \$6,200 for the plaintiff on mortgage of the plaintiff's lands procured the plaintiff and his wife to execute a mortgage for that amount. P., the mortgagee, actually paid the money to M., and got from him a mortgage and had it registered, but M. absconded without paying over the money to the plaintiff, who now sued the defendant for the said sum of money, or in the alternative, a release of the mortgage, and reconveyance of the lands.

*Held*, that the mortgage being left in the hands of M. did not prove that he was an agent of the plaintiff to receive the money from the defendant, and since the plaintiff denied having given M. any authority to receive the money, and the defendant had not proved the agency of M. to receive the money (the onus of proving which rested on him), therefore the plaintiff was entitled to judgment, with costs.

Walkem, Q.C., and McIntyre, Q.C., for the plaintiff.

Britton, Q.C., and Whiting, for the defendant.

Boyd, C.]

[November 24.

### BERRIE v. WOODS.

*Landlord and tenant—Covenant running with land—Covenant to pay for permanent improvements at termination of lease.*

J. B. demised certain lands to the defendant for ten years by deed of lease, which lease contained the following clause: "At the expiration of the lease the lessor, his heirs and assigns will pay or cause to be paid to the said lessee, etc., one half of the then value of any permanent improvements he may place upon the said lands; provided, however, if the said lessor, his heirs and assigns, at the expiry of the term, grant a new lease for a further period of five years, said improvements shall belong to said lessor, his heirs or assigns." Pending the term of ten years, J. B. conveyed the lands to the plaintiffs in fee as tenants in common, who at the expiration of the said term demanded possession from the defendant, who thereupon made a claim in respect to improvements under the above clause in the lease.

*Held*, that the liability to pay for the improvements ran with the land and attached as an equitable lien thereon against the plaintiffs. Judgment given that possession was to be delivered forthwith to the plaintiff, subject to a lien on the property for the value of the defendant's improvements under the terms of the lease. Lien to attach on the title which J. B. had prior to the deed to the plaintiff. Reference to the master to fix value of improvements.

Moss, Q.C., and Meek, for the plaintiff.

Millar, for the defendant.

Boyd, C.]

[November 29.

### RE LEGARIE ET AL. v. THE CANADA LOAN AND BANKING CO.

*Division Court—Prohibition—Equitable claim—Surplus in hands of mortgagee.*

*Held*, that a Division Court had jurisdiction to entertain a claim for less than \$100 made by a mortgagor upon the surplus proceeds of a mortgage sale which realized less than \$400. Such a claim is an equitable cause of action for money had and received.

Washington, for the defendants.

C. J. Holman, for the plaintiffs.



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[Prac.]

Boyd, C.]

[Nov. 30.]

NATIONAL INSURANCE COMPANY V.  
MCLAREN.

*Insurance—Subrogation—Action against wrong-doer—Estoppel by judgment—Res inter alios acta.*

The defendant, who owned a lumber yard, insured his property with a number of insurance companies, the value of his whole insurance amounting to \$50,000.

In May, 1879, his said property was set on fire by sparks from an engine of the Canada Central Railway Company, and a large portion destroyed. The amount of his loss exceeded the \$50,000 insured, and he claimed and obtained from the insurance companies the whole amount of his insurance, viz.: \$50,000. Afterwards, on September 22nd, 1879, he commenced an action for damages against the railway, and in March, 1882, he recovered against the railway \$100,000 damages and his costs of suit. It appeared that the jury in this last mentioned action had been asked specifically what was "the actual value of the lumber destroyed," to which they gave the answer "\$100,000, including ties and rails." The plaintiffs in the present action, who were some of the said insurance companies, now claimed that the defendant obtained from the railway company by his said verdict a sum larger than the difference between the amount of the insurance and the amount of his loss; and that he, the defendant, was a trustee for that excess for the plaintiffs respectively in proportion to the amount of their insurances. They contended that their right to be subrogated into the benefit of a compensation received by the defendants from the wrongdoers (the railway company), arose when they (the plaintiffs) made payment of the insurance money to the defendant, and that he then became trustee for them *pro tanto*, and in this character prosecuted his litigation against the railway company, and as a consequence from this they argued that the finding of the jury as to the actual total loss was binding and conclusive on McLaren as well as on them (the plaintiffs), because as beneficiaries they were privies to that judgment, and therefore they said the defendant was now estopped

from proving in this action that his actual loss was more than \$100,000. The defendant, however, denied that \$100,000 correctly represented the whole of his loss, which he asserted exceeded the whole \$150,000 which he had received from the insurance company and the railway.

*Held*, that the defendant was not concluded by the finding of the jury in his action against the railway company, and that the utmost right of the plaintiffs here was to have the amount recovered as damages from the railway company brought into account together with the moneys previously paid by the plaintiff for insurance, in order to ascertain whether the defendant had been more than fully compensated for his total loss by fire and other loss and outlay connected with the litigation, and for these purposes the matter was referred to the master.

The right of subrogation, being an equitable right, partakes of all the ordinary incidents of said rights, one of which is that in administering relief the court will regard not so much the form as the substance of the transaction. The primary consideration is to see that the insured gets full compensation for the property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the benefit of the insurance company, but it is a begging of the question to assert that he is a trustee from the time of payment by the insurers.

*C. Robinson, Q.C., and J. F. Smith, Q.C., for the plaintiffs.*

*D. McCarthy, Q.C., and Creelman, for the defendants.*

PRACTICE.

Ferguson, J.]

[November 10.]

TAYLOR V. THE SISTERS OF CHARITY OF  
OTTAWA.

*Appeal—New affidavits—Ex parte order.*

Upon an appeal by the defendants from an order obtained *ex parte* by the plaintiff, the defendants were permitted to read affidavits which were not before the master who made the order appealed from.

*Hoyles, for the defendants.*

*W. M. Douglas, for the plaintiff.*

Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

Ferguson, J.]

[November 16.]

**CHAMBERLAIN V. CHAMBERLIN.**

*Pleading—Claim arising since action—Set-off—Counter-claim—O. J. A.*

The O. J. A. has not changed the law so as to allow of a claim arising since the commencement of the action being pleaded as a set-off, although it may be made the subject of counter-claim.

A defence which is wholly inapplicable may be struck out, unless amended, although it is neither scandalous nor tending to prejudice, embarrass or delay.

*E. Douglas Armour*, for the appellants.  
*Edminson*, for the respondents.

Ferguson, J.]

[November 18.]

**DOMINION BANK V. HEFFERNAN.**

*Costs, scale of—Attacking fraudulent conveyance—Amount of claim—Creditors' Relief Act, 1880 (O.).*

Where the plaintiffs had judgment and execution against one of the defendants for less than \$200, and were seeking, though not on behalf of all creditors, to set aside a conveyance by that defendant to the other as fraudulent, and where there were other executions in the hands of the sheriff amounting to more than \$200, and the action was dismissed at the trial,

*Held*, that if the plaintiffs had been successful all the executions must have been satisfied out of the property covered by the impeached conveyance, and the provisions of the Creditors' Relief Act would have applied to the case, and therefore the amount of the subject-matter involved exceeded \$200, and the costs were taxable on the High Court scale.

*C. J. Holman*, for defendants.  
*Leeming*, for plaintiffs.

Rose, J.]

[November 26.]

**PURVIS V. SLATER.**

*Cause of action—Assets in the jurisdiction—Debts due defendant—Rule 45 (e).*

Debts due to the defendant by persons resident in Ontario are "assets which may be rendered liable to the judgment," within the meaning of Rule 45 (e), O. J. A.

*Shepley*, for the defendant.

*Walter Read*, for the plaintiff.

Ferguson, J.]

[November 27.]

**CAMPBELL V. MARTIN.**

*Con't of court—Imprisonment—Discharge—Costs.*

Where a person has been imprisoned for contempt of court, the proper order upon an application for his discharge is that he be continued in prison for a definite period, unless the costs are sooner paid.

*Hoyles*, for defendant.

*C. J. Holman*, for plaintiff.

**OSGOODE HALL LIBRARY.**

List of books received at the Osgocde Hall Library during the months of August and September, 1886:—

- Angell on Highways, 3rd edition, Boston, 1886.
- Annual Register, The, for 1885, London, 1886.
- Bythewood's Conveyancing, 4th ed., London, 1884.
- Chambers' Handbook of Public Meetings, London, 1886.
- Colonial Statistical Tables, 1879-81, London, 1885.
- Correspondence re Queensland, London, 1886.
- Cassel's Digest Sup. Ct. Cases, Toronto, 1886.
- Carpmael's Patent Laws of the World, London, '85.
- Duryea's Assignments Patent Rights, Baltimore, '86.
- Dixon's Law of Probate, 2nd edition, London, 1885.
- Digest of Cases in Sup. Ct. Scotland, Edinburgh '86.
- Greene's Roman Law, 4th edition, London, 1884.
- Greenwood's Real Property Statutes, 2nd edition, London, 1884.
- Holland's Jurisprudence, Oxford, 1886.
- Harris' Hints on Advocacy, 7th ed., London, '84.
- Hayne's Students' Leading Cases, 2nd edition, London, 1884.
- Johnson's Patentee's Manual, 5th ed., London, '84.
- King's U. S. Mining Laws. Washington, 1885.
- Lloyd's Law of Compensation, 5th ed., London, '82.
- Law Journal Reports Digest, London, 1886.
- New York State Library Catalogue, Albany, 1883.
- Prideaux's Churchwarden's Guide, London, 1886.
- Quebec Law Digest, vol. 3, 1886.
- Routledge's Client and Solicitor in Legal Affairs, Gloucester, 1886.
- Rogers on Elections, 15 ed., Pt. 2, London, 1886.
- Stephen's National Biography, vol. 7, London, '86.
- Stone's Justices' Manual, 23rd ed., London, 1885.
- Taylor's Medical Jurisprudence, 3rd ed., Lon., '83.
- Wade on Law of Notice, 2nd edition, Chicago, 1886.
- Williams' and Bruce's Admiralty Practice, 2nd edition, London, 1886.

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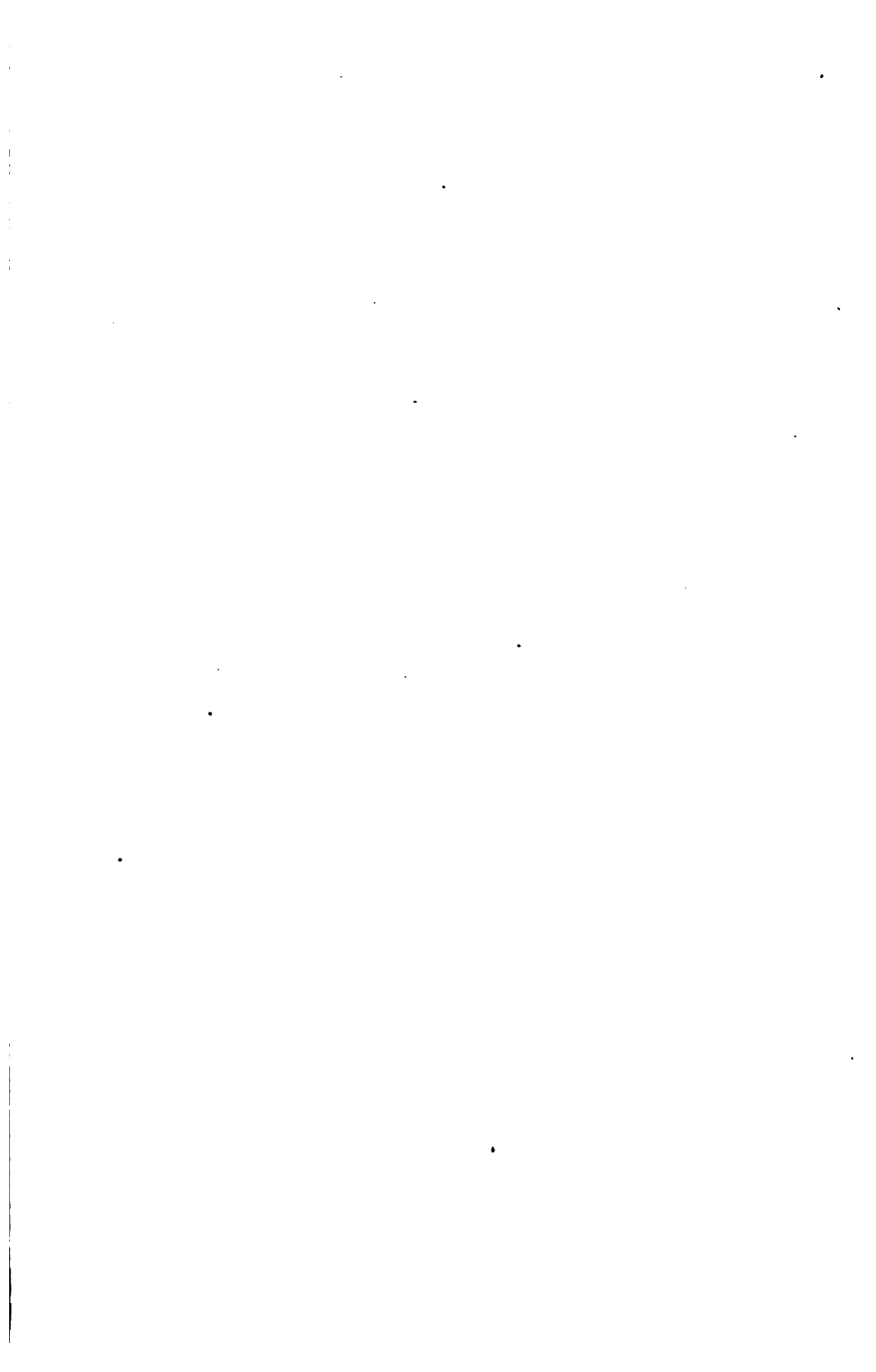
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